LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAY 10 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted]122

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JACOB KOSSMAN,
1225 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

International, 711 So. 10th St., Phila. 47, Pa.

TABLE OF CASES CITED.

	Page
Atkins v. United States, 307 F. 2d 937 (9th Cir. 1962)	10
Carnes v. United States, 295 F. 2d 598 (5th Cir. 1962), cert. denied 369 U. S. 861	7
Commonwealth v. Conklin, 399 Pa. 512, 160 A. 2d 566 (1960)	9, 10
Commonwealth v. Edwards, 394 Pa. 335, 147 A. 2d 313 (1959)	10
Dennis v. United States, 183 F. 2d 201 (2d Cir. 1950), affirmed 341 U. S. 491	10
Ferguson v. United States, 307 F. 2d 787 (5th Cir. 1962)	7
Glasser v. United States, 315 U. S. 60 (1942)	10
Goldman v. United States, 316 U. S. 129 (1942)	5, 6
Hall v. United States, 308 F. 2d 266 (5th Cir. 1962), cert. denied 371 U. S. 952	7
Harris v. United States, 310 F. 2d 934 (10th Cir. 1962)	7
Lopez v. United States, 305 F. 2d 825 (1st Cir.), cert. granted 371 U. S. 859	9
Lutwack v. United States, 344 U. S. 604 (1953)	10
McKenzie v. United States, 126 F. 2d 553 (D. C. Cir. 1942)	9
Olmstead v. United States, 277 U. S. 438 (1928)	6, 8
On Lee v. United States, 343 U. S. 747 (1952)	9
Rathbun v. United States, 355 U. S. 107 (1955)	5, 6, 7, 8
Schwartz v. Texas, 344 U. S. 199 (1952)	7
State v. Howell, 218 N. C. 280, 10 S. E. 2d 815 (1940)	10
Todisco v. United States, 298 F. 2d 208 (9th Cir. 1961), cert. denied, 368 U. S. 989	5
United States v. Soblen, 301 F. 2d 326 (2d Cir. 1962)	10
United States v. Stephenson, 121 F. Supp. 274 (D. C. 1954) appeal dismissed 223 F. 2d 336	8
Williams v. United States, 311 F. 2d 721, pending on petition for certiorari, No. 1120 Misc., this Term	7

MISCELLANEOUS.

	Page
U. S. Constitution:	
Fourth Amendment	2, 3, 4
Fifth Amendment	2, 3, 4, 9
Sixth Amendment	2, 9
18 U. S. C. § 371	3
18 U. S. C. § 875(b)	3
18 U. S. C. § 1951	3
28 U. S. C. § 1254(1)	1
Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1081, 1100, 1103:	
§ 301 (47 U. S. C. § 301)	2, 8
§ 501 (47 U. S. C. § 501)	2, 8
§ 502 (47 U. S. C. § 502)	2, 8
§ 605 (47 U. S. C. § 605)	2, 5
Orders of the Federal Communications Commission of November 26, 1947, and May 20, 1948, 12 F. C. C. 1003, 1006-1007, 1008-1009	2, 7

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Frank Palermo, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on February 13, 1963.

OPINIONS BELOW.

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 1a-53a, is reported at 314 F. 2d 718.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 13, 1963 (Appendix B, *infra*, p. 54a), and a petition for rehearing was denied on March 19, 1963 (Appendix B, *infra*, p. 55a). On April 15, 1963, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to May 18, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a recording obtained by a police officer by use of an induction coil which intercepted a telephone conversation without the knowledge of petitioner, a party to the conversation, and played to a jury in a federal trial, was inadmissible as having been obtained in violation of the Fourth and Fifth Amendments to the United States Constitution and the Federal Communications Act.

2. Whether recordings obtained by police officers of a conversation between a government witness equipped by the police officers with a minifon recorder and a radio transmitter and an alleged co-conspirator in the latter's hotel room were obtained in violation of the Fourth and Fifth Amendments to the United States Constitution and the Federal Communications Act.

3. Whether the petitioner was deprived of a fair trial and denied due process because the district court instructed the jury when it should find a verdict of guilty, but refused to instruct, although requested, when the jury should find a verdict of not guilty.

4. Whether the petitioner was entitled to an instruction to the jury restricting the use against him of hearsay testimony as to declarations of alleged co-conspirators.

STATUTES INVOLVED.

The relevant constitutional, statutory and regulatory provisions are printed in Appendix C, *infra*, pp. 56a-61a. They are the Fourth, Fifth and Sixth Amendments to the United States Constitution, §§ 301, 501, 502 and 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1081, 1100, 1103 (47 U. S. C. §§ 301, 501, 502, 605), and the Orders of the Federal Communications Commission of November 26, 1947, and May 20, 1948, 12 F. C. C. 1003, 1006-1007, 1008-1009.

STATEMENT.

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District of California, upon an indictment, seven counts of which charged him with conspiring to extort and extortion affecting commerce, in violation of 18 U. S. C. § 1951, of transmitting threats in interstate commerce in violation of 18 U. S. C. § 875(b), and of conspiring to commit an offense against the United States under 18 U. S. C. § 371, i.e., transmitting threats in interstate commerce in violation of 18 U. S. C. § 875(b). Petitioner was sentenced to a fifteen-year imprisonment and fined $10,000 on Count 1; five years consecutively on each of Counts 2, 4 and 5; five years consecutively on each of Counts 6, 8 and 10; the imprisonment on Counts 2, 4, 5, 6, 8 and 10 to be concurrent with that imposed on Count 1.

Government Exhibit 177 is a recording made by an officer of the Los Angeles police department on May 5, 1959, at the home of one Leonard of a telephone conversation between Leonard and petitioner. Petitioner had telephoned Leonard and sought to have him meet petitioner and Sica. Petitioner told Leonard that he had been contacted by Carbo and that petitioner and Leonard had to call Gibson. This conversation was intercepted by an induction coil placed near Leonard's telephone without petitioner's knowledge. The recording was received in evidence (R. 6726) [1] although petitioner and the other defendants had objected on the ground that it was obtained in violation of the Fourth and Fifth Amendments and the Federal Communications Act (R. 6712-6715).

Government Exhibits 100, 101, 102 and 176 were electronic recordings made by a police officer of the Los Angeles Police Department on May 14, 1959, of a conversation

1. Page references prefixed "R" relate to the Reporter's transcript of the trial; references prefixed "TR" relate to the Clerk's transcript of the Record.

between one Leonard and one Daly, an alleged co-conspirator (but not indicted) which took place in the latter's hotel room. Leonard had been equipped by the police with a miniature wire recording device and also with a miniature radio transmitter which transmitted the conversation to a recording device placed by the police in the hotel. The recordings disclosed a number of references to the petitioner herein. The recordings were received in evidence (R. 2343, 2344, 2358, 2508, 2527, 6702, 6708), and heard by the jury over objections and motions of all defendants on multiple grounds including that they were obtained in violation of the Fourth and Fifth Amendments.

A substantial part of the proof offered by the government consisted of testimony as to statements made by various of the co-defendants out of the presence of their fellow co-defendants. Although the trial court was specifically requested to render to the jury an instruction respecting the conditions under which such statements may be used against defendants other than the declarant,[2] such instruction was omitted. Upon the conclusion of the charge to the jury, exception was taken to the omission (R. 7713). Thereupon, the trial judge rendered an instruction limited to the defendant Gibson (R. 7714-7715) and refused to apply it to petitioner (R. 7719).

The defendants below made various requests for charge[3] the substance of which was that if an element of the offense was not proved, the jury should find the defendant not guilty. The trial judge omitted from the charge to the jury any instruction as to when the jury should find a defendant not guilty, or to instruct the jury that it could return such a verdict. The charge, in a number of in-

2. Carbo requests Nos. 1 (TR 644), 3 (TR 646), 4 (TR 647); Sica request No. 11 (TR 705); Dragne request No. 4 (TR 725), 5 (TR 726); Gibson request "D" (TR 734); incorporated by reference in petitioner's requests (TR 683).

3. E.g., Palermo's request "C" (TR 687), and others included by reference (TR 683); requests numbered 6 (TR 649), 20 (TR 664), 22 (TR 665), 24 (TR 667), 25 (TR 668), 27 (TR 670), 32 (TR 675).

stances, does state when a defendant may, or should, be found guilty, but nowhere does the charge use the words "acquit" or "not guilty".

The court below affirmed petitioner's conviction. With respect to the admission into evidence of the recording of the telephone conversation (Government Exhibit 177), it concluded that *Rathbun v. United States*, 355 U. S. 107 (1955) was applicable, indistinguishable and controlling (Appendix A, *infra*, pp. 31a-33a). With respect to the recordings of the conversation between Leonard and Daly, the court below briefly held (Appendix A, *infra*, pp. 30a-31a) that the recordings were admissible, relying upon its decision in *Todisco v. United States*, 298 F. 2d 208 (9th Cir. 1961), cert. denied, 368 U. S. 989. As to the refusal of the trial court to instruct the jury on the use of evidence of co-conspirators' statements, the court below concluded that the no instruction was required on the ground that it was for the trial judge to determine admissibility of the evidence (Appendix A, *infra*, pp. 24a-30a). The court below made no statement in its opinion concerning the failure of the trial court to instruct the jury on acquittal.

REASONS FOR GRANTING THE WRIT.

1. This case presents a disturbing erosion of the prohibitions enacted by Section 605 of the Federal Communications Act, prohibitions that Congress has refused to relax despite repeated urgings by successive Attorneys General. For the induction coil here used intercepted the conversation before it reached its destination, quite as plainly as if, using less sophisticated methods, the recording device had been physically attached to the telephone wire.

Petitioner submits that what the court below sanctioned in the present case was plainly contrary to the considered views expressed in *Goldman v. United States*, 316 U. S. 129, and was not required by anything decided in *Rathbun v. United States*, 355 U. S. 107.

(a) This Court in *Goldman* pointed out (pp. 133, 134) that "What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission," and that the word "intercept" in the statute "indicates the taking or seizure by the way or before arrival at the destined place." Here the induction coil took or seized the message before it reached the recipient's ear, violating the statute quite as clearly as if there had been an actual tap. Surely the Communication Act's prohibition against interception is not limited by the state of the art as it stood in 1934, so that it fails when confronted with a situation then already close enough to realization to have been foretold a few years earlier. For this case presents the fulfilment of Mr. Justice Brandeis' prediction in *Olmstead v. United States*, 277 U. S. 438, 473, 474:

> "Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. * * * The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. * * *"

(b) In *Rathbun*, which involved listening in over an extension telephone, which was there held not to involve any violation of the statute, the Court pointed out (355 U. S. at 109, 111) that "The telephone extension is a widely used instrument of home and office," and that "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation." Here, however, there was no extension telephone, and it certainly cannot fairly be contended either that an induction coil is a widely-used instrument of home or office, or that each

party to a telephone conversation takes the risk that the other party has an induction coil attached to his own instrument.[1] Therefore, even if the *Rathbun* case stands undisturbed, its rationale does not cover the obvious and flagrant violation of the Communications Act that is involved in the present case, however much it may still rule the extension telephone cases, such as *Carnes v. United States*, 295 F. 2d 598 (C. A. 5), certiorari denied, 369 U. S. 861; *Ferguson v. United States*, 307 F. 2d 787 (C. A. 10), pending on petition for certiorari, No. 583 Misc., this Term; *Hall v. United States*, 308 F. 2d 266 (C. A. 5), certiorari denied, 371 U. S. 952; and *Harris v. United States*, 310 F. 2d 934 (C. A. 10).

(c) Here, however, there was no extension phone, but only an induction coil that effected an electronic rather than a physical interception of the communication. Unhappily, the present case is not unique; the same practice was sustained by the Seventh Circuit in *Williams v. United States*, 311 F. 2d 721, pending on petition for certiorari, No. 1120 Misc., this Term. The increasing and obviously prevalent use of induction coils by Federal law enforcement officials, and the public importance of determining the precise scope of the Federal Communications Act's prohibition against interception of telephone messages, accordingly combine to demonstrate that the present issue assuredly requires review by this Court.

(d) Moreover, so far as concerned the recording that was made of the message picked up by the induction coil, there was involved a violation of the orders of the Federal Communications Commission (12 F. C. C. 1003, 1006-1007, 1008-1009) (Appendix C, *infra*, pp. 58a-61a) that require a signal, familiarly known as a "beep," to advise the sender that his telephone conversation is being recorded.

1. In *Schwartz v. Texas*, 344 U. S. 199 (1952), this Court assumed that the use of an induction coil would be improper in a federal proceeding.

The court below refused to consider this objection because it was not made specifically at the trial, and because the regulations were not cited on appeal (Appendix A, *infra*, p. 32a, note 20).

Since, however, objection was made at the trial that the recording was made in violation of the Act; since the regulations are plainly within the realm of judicial notice—and were so noticed by this Court in the *Rathbun* case, 355 U. S. at 110, note 7; and since violation of the regulations is itself made criminal by Sections 501 and 502 of the Act (Appendix C, *infra*, p. 57a), petitioner considers as purely captious this ground for not dealing with the violation of the "beep" regulation, and one unhappily reminiscent of the older approach to criminal law that the Federal Rules have advisedly rejected. It will therefore not come as a surprise that precisely the same objection had been elsewhere deemed entirely adequate. *United States v. Stephenson*, 121 F. Supp. 274 (D. D. C., *per* Pine, D. J.), appeal dismissed, 223 F. 2d 336 (D. C. Cir.).

(e) Petitioner further urges that *Olmstead v. United States*, 277 U. S. 438 (1928), requires re-examination and reversal.

2. While the induction coil interception involves primarily a statutory question, another issue now presented is essentially constitutional.

Here there were received in evidence recordings (Govt. Ex. 100-102, 176) of conversations between the alleged co-conspirator Daly, *in his hotel room*, and Leonard, who was equipped by police officers with both a minifon recording device and a radio transmitter, which transmitted the voices to a recording device in the hotel. See § 301 of the Federal Communications Act (Appendix C, *infra*, p. 56a). These recordings contained many prejudicial references to the petitioner.

Briefly, petitioner contends that he has standing to object to such evidence, both as a co-defendant and as a

co-conspirator; and that the present case is not governed by *On Lee v. United States*, 343 U. S. 747, since what was accomplished here was an illegal search.

Substantially similar questions are now before this Court in *Lopez v. United States*, 305 F. 2d 825 (C. A. 1), certiorari granted, 371 U. S. 859, which was argued on January 14, 1963 (No. 236, this Term). The same reasons that warranted review in the *Lopez* case are, petitioner submits, fully applicable here.

If certiorari is granted in this case, petitioner desires to argue two additional questions, here very summarily set forth.

3. The lengthy charge of the trial court to the jury evinced a studied and conscious effort to avoid the words "not guilty" and "acquit." Numerous requests for charge were submitted phrased in usual form, to the effect that if essential facts were not found, the verdict must be "not guilty." Contrariwise, the trial judge frequently instructed the jury that if it found essential facts, it could or should convict. Nowhere in the total charge was the jury instructed as to acquittal. Indeed, on the subject of reasonable doubt, customarily presented in the form that if a reasonable doubt exists the jury must acquit, the trial judge said:

> "While remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict." (R. 7642)

Precisely what the defendant was entitled to by virtue of any remaining doubt was never stated.

Petitioner submits that the Fifth and Sixth Amendments require the trial judge to refrain from one-sidedness, and to instruct the jury in plain words that it may return a verdict of not guilty. Cf. *McKenzie v. United States*, 126 F. 2d 553 (D. C. Cir. 1942); *Commonwealth v. Conklin*, 399

Pa. 512, 160 A. 2d 566 (1960); *Commonwealth v. Edwards*, 394 Pa. 335, 147 A. 2d 313 (1959). The failure to instruct the jury as to its right and duty to return a verdict of not guilty deprived the petitioner of a substantial right, and was prejudicial. *State v. Howell*, 218 N. C. 280, 10 S. E. 2d 815 (1940). By reason of such fundamental inadequacy, petitioner is entitled to a new trial.

4. The treatment accorded by the court below to the concededly hearsay testimony of statements by alleged co-conspirators so far departs from the accepted and traditional standards in criminal cases as to require review by this Court. The decision is one which completely overturns the law, implicitly recognized by this Court in *Lutwack v. United States*, 344 U. S. 604, 618, 619 (1953), and *Glasser v. United States*, 315 U. S. 60 (1942). Under the decision of the court below criminal justice no longer requires instruction to the jury, when requested as here, on the limitations to which such hearsay evidence is subject. Indeed, contrary to *Glasser, supra*, 315 U. S. at p. 75, hearsay may now lift itself by its own bootstraps to the level of competent evidence.

The court below relied extensively on *dicta* in *Dennis v. United States*, 183 F. 2d 201, 230-231 (2d Cir. 1950), affirmed 341 U. S. 491. But even in the Second Circuit, the rule is to the contrary: *United States v. Soblen*, 301 F. 2d 236, 241 (2d Cir. 1962), where an instruction to the jury on the use of hearsay evidence of the acts and statements of alleged co-conspirators as proof of membership in the alleged conspiracy was deemed "required by law." Previously, the Ninth Circuit recognized the usual rule: see *Atkins v. United States*, 307 F. 2d 937, 940 (9th Cir. 1962).

Not only is the decision *sub judice* in conflict with the weight of authority, but in this instance, it approved the unusual and prejudicial course of the trial judge in rendering the customary instruction in favor of but *one* (not petitioner) of the alleged co-conspirators. The refusal of the trial judge to extend its instruction to other defendants,

including petitioner, made it obvious to the jury that the opposite applied to them. This added prejudicial confusion to prejudicial error.

5. Petitioner adopts without repeating the reasons, where applicable, for granting the writ advanced by each of his co-defendants in their petitions for a writ of certiorari to review the decision of the court below.

CONCLUSION.

For the reasons stated, the Petition for a Writ of Certiorari should be granted

Respectfully submitted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner,
Frank Palermo.

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, FRANK PALERMO, JOSEPH SICA, LOUIS TOM DRAGNA, and TRUMAN K. GIBSON, JR., *Appellants*,	No. 17,762
v.	Feb. 13, 1963
UNITED STATES OF AMERICA, *Appellee.*	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

Before: BARNES, HAMLIN and MERRILL, *Circuit Judges*

MERRILL, *Circuit Judge*

Appellants stand convicted of extortion affecting commerce and conspiracy to extort in violation of 18 U. S. C. § 1951, commonly known as the Hobbs Act,[1] of the inter-

1. "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all

state transmission of threats and conspiracy to transmit in violation of 18 U. S. C. § 875(b),[2] and of conspiracy to commit an offense against the United States under 18 U. S. C. § 371.[3] They were variously charged in ten counts of an indictment by the Grand Jury of the Southern District of California, Central Division. On May 30, 1961, following trial, they were found guilty by jury verdict and on December 2, 1961, were duly sentenced. They have appealed from their several judgments of conviction.

The case involves in general the business of professional boxing and fight promotion and, more specifically, the efforts of appellants to secure managerial control of Don Jordan, a welterweight fighter, by bringing pressure to bear on his manager, Donald Nesseth. These efforts were prompted, according to the theory of the United States as expressed in its brief, by the fact that "* * * 'control' of champions and top contenders was the only significant profit factor in the operation of the boxing business. The evidence shows that 'control' was effected and maintained through matching controlled fighters with one another and that the technique for obtaining this control was to capture the fight manager through use of economic and, as a last resort, physical coercion."

---

commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

2. "(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

3. "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Since the contentions on appeal relate importantly to the sufficiency of the evidence, the facts must be dealt with at some length.

THE FACTUAL BACKGROUND.

The matching of controlled fighters has already been considered by the federal courts in proceedings brought against the International Boxing Clubs of New York and Illinois for violation of the Sherman Act, International Boxing Clubs v. United States, 1959, 358 U. S. 242, affirming United States v. International Boxing Clubs, S. D. N. Y., 1957, 150 F. Supp. 397. Since these proceedings figure directly in the background of the case at bar, a reference to the facts there established is helpful. The Supreme Court, at pages 245-246 recites:

> "The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtaining from each of the four leading contenders exclusive promotion rights including rights to radio, television and movie revenues. Upon securing these exclusive contracts, Louis assigned them to the appellant International Boxing Club, Illinois . . ."

The opinion then recites that Norris and Wirtz organized the International Boxing Club of New York and for it acquired control of Madison Square Garden and entered into other contracts. The opinion then states, at pages 247-248:

> "This series of agreements, consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship divisions, i.e., heavyweight, middleweight, and welterweight. Not satisfied with this temporary con-

trol, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, for a period of from three to five years. Over the facilities for the staging of contests appellants exercised like control, owning or managing the 'key' arenas and stadia in the Nation.

* * *

"The effect of the conspiracy is obvious. Using the facilities of I. B. C., Illinois, and I. B. C., New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a contender thereafter was clear, i.e., to sign with appellants or not to fight."

Later, at page 254 the opinion states:

"This illegal activity gave appellants an odorous monopoly background which was known and still feared in the boxing world."

By the decree Norris and Wirtz were directed to divest themselves of their stock holdings in Madison Square Garden. The boxing clubs were ordered dissolved. All exclusive agreements for the promotion of boxing events were banned.

Appellant Truman Gibson, a Chicago attorney, represented Joe Louis in 1949 at the outset of the sequence of events described in the Supreme Court opinion and from their inception was active in the affairs of the International Boxing Clubs. In 1958 he was made president of both clubs. It is the government's position that as antitrust pressure was applied to the clubs they ceased their practice of requiring that exclusive management be granted

to the clubs; that the practice of securing exclusive management agreements was continued by Appellants Carbo and Palermo and that Appellant Gibson, with full knowledge of Carbo's practices and methods of operation, continued, through his dealings with Carbo and for their mutual advantage to match Carbo-controlled fighters.

Carbo, with a background of underworld association, emerges as the leader of the conspirators. Gibson's first contact with him came shortly after the boxing clubs were organized sometime in 1950. From time to time between 1954 and 1957, Gibson caused payments amounting to approximately $40,000.00 to be made to Carbo by the boxing clubs through the device of placing Carbo's wife, Viola Masters, on the clubs' payrolls for fictitious employment. Payment was explained by Gibson as being for the purpose of securing Carbo's good will and of preventing fighters or managers with whom Carbo had "influence" from becoming antagonized or alienated. In investigations conducted by the United States Senate, Gibson had explained why Carbo's wife had been employed rather than Carbo himself: "Because it looked a little bit better on our records, not ever considering the possibility of being called before a senate investigative committee, to have Viola Masters down instead of Frank Carbo." Both before the Senate committee and in trial below, Gibson acknowledged that in their operations the boxing clubs had had dealings with the underworld. This practice was resorted to in order "to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements." Gibson testified that the boxing clubs would use "everyone" they could to prevent fixed fights and that in "everyone" he included the underworld. On redirect examination Gibson was asked whether it was "the policy of the International Boxing Club or any other organization with which you were connected in the fight business to use force or violence or threats of force and violence * * *" to which Gibson replied "No indeed."

On re-cross-examination he was asked: "Of course, Mr. Gibson, when you used various people to achieve your ends you didn't know what those other people were doing on your behalf, did you?" To which Gibson answered: "Not completely, no."

The district court judgment in the antitrust action was rendered in March, 1957. Commencing in the summer of 1958 Gibson sought to extend the influence of the boxing club to the west coast. At that time there were two exhibition halls in Los Angeles suitable for the staging of boxing contests: the Hollywood Legion Stadium and the Olympic Auditorium. Gibson moved to secure control of both.

At this time he was in charge of promoting weekly the two nationally televised boxing contests: Wednesday night on ABC, and Friday night on NBC. At least $180,000.00 a week was received by the boxing clubs in connection with these promotions. The possibility of sharing in the television profits provided an incentive to deal with Gibson. A new organization known as the "Hollywood Boxing and Wrestling Club" was established by Gibson and his associates to lease the Hollywood Legion Stadium. The International Boxing Clubs lent $28,000.00 to this organization to commence operation. Named as president of the new organization and acting as its promoter and matchmaker was Leonard Blakely, known professionally (and hereinafter referred to) as "Jackie Leonard." Leonard's vulnerability to economic pressure from Gibson is apparent. Not only was his club indebted to Gibson's organizations but his future was largely dependent on Gibson's good will with respect to participation in the televising of contests.

In the fall of 1951, Virgil Akins, a Carbo-controlled fighter, was welterweight champion. A promising contender was Don Jordan, who was managed by Donald Nasseth. Nasseth had been making repeated efforts to obtain fights for Jordan on national television and had enlisted Leonard's support in this respect. With Gibson's

assistance Leonard secured one such fight at the Legion Stadium with the fighter then ranked as the number one contender in the welterweight ranks. Jordan won this and two other televised bouts and became the leading contender for the title. A fourth match at the Olympic Auditorium in Los Angeles was arranged for October 22, 1958, and Gibson assured Nesseth that Akins, the champion, had agreed to defend his title against the winner of the bout. Jordan won.

The sequence of events which are now related are based in large part on the testimony of Jackie Leonard and in many respects are vigorously denied.

On October 23, 1958, while Nesseth, Leonard and Gibson, at the Olympic Auditorium, were discussing the anticipated championship fight between Akins and Jordan, Gibson received a telephone call from Appellant Palermo. Gibson spoke briefly and then handed the phone to Leonard, saying that "Blinky" wanted to speak to him. Palermo told Leonard, "We are in for half the fighters [fifty per cent of the manager's share] or there won't be any fight." Leonard protested that he had never heard of any such proposition before, and Palermo, upon learning that Gibson had not explained the situation, told him to talk it over with Gibson and call him back. When Leonard recounted the conversation, Nesseth flatly refused. Gibson explained that Carbo and Palermo controlled Akins and apologized for not having informed him of Palermo's demands earlier.

Gibson, Nesseth and Leonard met later in the day at Gibson's hotel for purposes of privacy and continued to discuss Palermo's demands. According to Leonard's testimony, Gibson said: "You know how Carbo and Blinky [Palermo] are * * *. They want all of everything before you can get a welterweight title fight * * * [but] go along with it. It has been done before. That is the way the welterweight and lightweight title has been worked since Carbo and Blinky got into the picture." Gibson proposed that Nesseth should tell Palermo that he agreed,

and assured Nesseth and Leonard that he, Gibson, would straighten things out later in Chicago. Nesseth refused. He feared violent retaliation if Carbo and Palermo, falsely informed that Nesseth had yielded, should later discover that he had no intention of surrendering an interest in Jordan. He testified: "* * * we reminded Truman [Gibson] that these weren't kids that we were talking to, and that he couldn't do very much protecting from 2,500 miles away, if they decided to start playing rough, and Truman scoffed at that and said that went out with high-buttoned shoes, that there wouldn't be any of that, and not to worry, that he would straighten it out." Gibson finally persuaded Leonard to call Palermo and to tell him the arrangement was satisfactory. This Leonard did, learning from Palermo that Gibson had already advised him that everything was all right.

On December 5 Jordan defeated Atkins and became the welterweight champion of the world. The fight arrangements called for a re-match if Jordan won, with Palermo's share of both fights being payable after the re-match. Jordan won the re-match.

Between these two matches, Jordan on January 22, 1959, fought a match with another fighter, Gutierrez. Leonard asked Gibson who was to pay Palermo's share of that fight and Gibson said that if necessary he would pay it himself.

After the Gutierrez fight, when the money was slow in coming, Palermo telephoned Leonard, screamed and shouted that he was being stalled and double-crossed. Leonard tried to pacify him by telling him that he had seen Gibson that day and that the money would be sent. Palermo said he didn't want to hear anything about Gibson; that he was holding Leonard and Nesseth responsible and that Leonard was expected to handle Nesseth. Carbo then took the phone from Palermo and, according to Leonard's testimony, "He said, 'You son-of-a-bitching double-crosser.' He said, 'You are no good,' and he says, 'Your word is no good. Nothing

is no good about you.' He said, 'Just because you are 2,000 miles away, that is no sign I can't have you taken care of.' He said, 'I have got plenty of friends out there to take care of punks like you.' He said, 'The money had better be in.' * * * I was trying to get a word in edgewise, to tell him the money would be sent that day. He wouldn't let me say anything, he was just cursing and hollering at me and saying there would be somebody out here to take care of me, and if that money wasn't there right away somebody would be looking me up."

Leonard was badly frightened by the conversation. After hanging up he turned to Nesseth, who had been standing next to the telephone booth, and told him everything that had been said. Nesseth noticed that Leonard was "shaken up, nervous."

Leonard later, by arrangement with Gibson, sent his personal check for $1,725.00 to Claire Cori (Palermo's wife) and was reimbursed by Gibson.

During this period of time Palermo and Gibson both began to express an interest in matching Jordan with Sugar Hart, another Carbo-controlled welterweight. Nesseth was not interested. The match would be a hard one and Nesseth felt easier matches would be more profitable and less risky.

The Jordan-Akins re-match was held in St. Louis on April 24, 1959. Palermo immediately demanded his share from Nesseth. Nesseth flatly refused to pay anything and explained that he had never consented to surrender an interest in Jordan and the circumstances under which Leonard and Gibson had stated the contrary to Palermo. Palermo's final comment was that "'The Man' isn't going to like this." Palermo called Leonard and, according to Leonard's testimony: "He told me I would be hearing from him right away, I better do something to straighten this mess out or I was going to get into a lot of trouble with the people back East."

On April 28 Nesseth and Leonard were in Leonard's office when a call came from Carbo. Leonard testified: "* * * the voice said, 'Hello, hello, hello. You know who this is?' I says, 'Yeah, I know who this is.' And he says, 'You're a no good'—and he used some vulgar language and called me a double-crosser and told me that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead, and he called me another S. B. and different names, real bad names, 'double-crosser,' and he says; 'We are going to meet at the crossroads,' he says, 'You will never get away with it. I have had that title 25 years and no punks like you are going to take it away from me.' and he repeated that statement, he says, 'When I mean get you, you are going to be dead,' he said, 'We will have somebody out there to take care of you.' "

Nesseth testified: "What I heard from Leonard's end of the conversation, there wasn't very much conversation on his part. One or two times he stammered and said, 'You shouldn't say those things.' But the call, I would say it was very one-sided, and I did notice and observe that Leonard turned about the color of your shirt during the course of that conversation, and when the phone call was over and he hung up the phone he sat there just for a second and he got up and ran across the hall to the ladies' room, which we used during the daytime as a men's room, and he vomited. I have never seen anybody any more shaken up than he was at that time."

A few minutes later a telephone call came from Palermo. Leonard testified: "And he said, I was a double-crosser and I was no good and he was coming to the coast and he was going to see some people and they were going to see me. And I told him there was no good to come, and I was mad, I was very mad, and I hung up on Blinky."

Later, at Leonard's home, he received another call from Palermo which he described as follows: "He wanted to know if I cooled off yet and said, 'Jesus, there is no use

being like that.' He says, 'After all, maybe the guy shouldn't have called like that, but' he said he figures he had a right to, 'they have had that account a long time and you people out there are double-crossing him.' He said, 'Now, we might as well be like gentlemen and not be mad,' and he says, 'I will be out there and talk to you.' I said, 'There is no use of coming out here, I am fed up with all of you,' and I told him he would have to see Nesseth and he said, 'I can't see Nesseth unless he will sit down and talk to me.' And I said, 'You will have to take care of that, there is nothing I can do about it. Nesseth doesn't want to talk to any of you and if you want to talk with him, you will have to make your own contact with him.' With that he said, 'Well, I will be out there in a few days and we are going to load you up.' "

On April 30 Gibson, who had been notified by Leonard of the threatening calls, telephoned Leonard and offered to pump additional capital into the Hollywood Club if Leonard would persuade Nesseth to agree to a Hart fight. On the same day Palermo arrived in Chicago from the east and stayed at the Bismark Hotel (owned by Norris and Wirtz) at the expense of the Boxing Clubs. On May 1 he met with Gibson and Hart's manager in the lobby of the hotel and thereafter left for Los Angeles.

On May 2 Leonard had a telephone call from Palermo summoning him to a late night meeting at a Los Angeles hotel. He entered the hotel to find Palermo in company with Appellant Sica. Describing his reaction to Sica's presence in company with Palermo, Leonard testified: "Well, the minute I seen him I remembered what Carbo had told me before about somebody on the west coast taking care of me and for once I was scared, when I seen him. * * * Well, by reputation I had always known of Joe Sica as an underworld man and a strong-arm man."

In their conversation, according to Leonard, Sica stated: "He says, 'Look, Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt.

Wouldn't you rather go grab him by the neck and straighten him out, than for me to go back tell "The Gray"? You try it, you are all right, but it is Nesseth that is no good.' 'The way it is now,' he says, 'you and Blinky have both got your necks in a sling,' and he said, 'Something has got to be straightened out.' He said, 'If you have to, go out and beat the hell out of Nesseth. If you need any help we will go with you and help you and drag him out of bed.' "

Also, referring to Palermo, Leonard stated: "Well, Blinky said, 'That is the only answer to the whole problem,' was for me to convince Nesseth to fight Sugar Hart and that that would straighten things out, as far as Carbo was concerned. And Sica agreed there, too. He said that I had my head in a noose and that was the only way I was going to get the thing straightened out, was to grab hold of Nesseth and make him take the fight with Sugar Hart."

The following day Nesseth called Gibson to complain of the threats that had been received. Gibson disclaimed responsibility but, according to Nesseth, "Truman said, 'Well, all the pressure can be relieved and you can also do your own Jackie Leonard a favor by saving his Club, if you will just agree to fight Sugar Hart.' And I told him they could forget that, because I had better things in mind and I wasn't going to fight Sugar Hart. We must have talked for probably 15 minutes and Truman agreed that he would call Norris and see what he could do about getting these people out of town."

On May 4, while Nesseth and Leonard were in Leonard's office, Palermo appeared and, shortly thereafter, Appellant Dragna. Nesseth immediately left the room. Palermo, in Leonard's presence, then explained the problem to Dragna and asked what Dragna thought of it. According to Leonard: "Dragna says, 'Well, you are wrong, Jackie. You are dealing with big people and your word should be your bond.' He says, 'After all, if your word is no good, then you are no good in this game. Everything is dealt—you are dealing with real nice people and big

people, and if your word is no good you are no good in this game.' "

Dragna inquired about Nesseth; whether he did not live out his way in West Covina and again whether he did not have a wife and child. Later, according to Leonard, Palermo stated: " 'Well, we have to make this Hart fight. At least, if I can go back and tell "The Old Man" '—meaning Frank Carbo—'tell him I have the Hart fight, that will take a lot of pressure off. I can tell him you tried and I tried and at least we have something accomplished.'. He said, 'I am going to leave,' and he said, 'I want you to make sure things are taken care of.' Dragna told me, he says, 'You are right in the middle of this thing, Jack.' And he said, 'You better try to get it straightened out or,' he says, 'you can be in a lot of trouble.' "

As, with Sica, Leonard understood that Dragna was connected with the underworld and associated his appearance with Carbo's threat. Nesseth also testified that he understood both Sica and Dragna were connected with the underworld. Dragna's appearance so upset him that he immediately sought and obtained police protection.

On May 5 an induction coil connected with a tape recording machine was placed beside Leonard's home telephone, with his consent, by the Los Angeles Police, and his office was equipped with a concealed microphone.

The following day Sica and Palermo called on Leonard and Nesseth at Leonard's office in an effort to persuade Nesseth to agree to a fight with Sugar Hart. The visitors received no satisfaction. As Sica was leaving, he leaned over Leonard and, according to Leonard, whispered in his ear: "Jackie, you are it." Nesseth confirmed that Sica had whispered in Leonard's ear as he was leaving.

On May 7, in telephone conversation with Gibson, Leonard had reported that Nesseth was still refusing a fight with Hart. Gibson stated, "Well, it's too bad. I could have saved the club if I could have made that fight."

On May 11, Gibson flew to Los Angeles with William Daly, named as an unindicted co-conspirator. Leonard was

out of town and was telephoned by Gibson, who advised that he had to return to Chicago but was leaving Daly there to talk to Leonard.

On May 13, after Leonard had returned, Daly called on him at his office. He wanted to know what Leonard was going to do about the money owed to Gibson. He said Leonard was in "hell of a jam" both regarding his club's financial obligations and regarding Nesseth. He said: "Carbo is really boiling." He told Leonard to call and see him at his hotel the next day.

The following day Leonard was equipped by the police with a Minifon wire recording device and also with a portable transmitting device. He then called on Daly. A lengthy conversation ensued, all of it taped.

According to Daly, Gibson was upset, saying he was in "a jackpot" because he had allowed the title to get out of "their" hands. He had accused Leonard and Nesseth of trying to destroy him, and had stated that instead "I'll have them destroyed." There was a discussion of a near fatal assault on Ray Arcel, a Carbo-controlled manager who had asserted his independence. Daly explained the technique of assault:

"See what they do. They use a water pipe, see. You know, regular lead water pipe. Lead pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see—* * * Just an ordinary piece of paper, that's all they ever use. And you sitting in a crowd. And they try to give you two bats, and they kill you with two if they can. But they whack you twice and split your—fracture your skull, and knock you unconscious, and they just drop it, they can't—there's no heat. You can't—you haven't got no weapon on you. If they said you did it, what the hell, you drop it in a crowd or out in the street. They drop it immediately. After they do it they drop it. And after they drop it—the law—they're protected by the law. They have

to have witnesses. They seen them come out and that's the guy, and that's what he used." And later: "They used a couple kids from Boston to do it." Leonard: "They always use professionals, guys from out of town." Daly: "Yeah, they were kids." Leonard: "Like here, if they wanted Don and I, they're not going to use somebody that we know, around here." Daly: "No. The Sicas would be home."

Leonard inquired as to why Sica was becoming involved in something not his business. Daly replied: "Well then, people in New York do them favors," and later: "I don't know what way they're going to handle that Nesseth, but they are going to handle him some * * * way." Daly complained of having to stay in Los Angeles. "I got a lot of things home to try to straighten out. But Truman says, 'Wait 'til Monday.' He's coming in Monday. What'll happen Monday, Jack?"

Leonard explained how he hoped to get financial aid for his club from a San Francisco promoter, Don Chargin, and stated that now Sica wanted to see Chargin. Daly stated: "Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people * * * You know. So it'll make the guy think a little bit, too, you know."

On June 4 Chargin was planning a trip from San Francisco to Los Angeles in connection with his negotiations with Leonard to take over the failing Hollywood Boxing and Wrestling Club. He received an anonymous telephone call as to which he testified: "The call stated to stay out of Hollywood and that they knew my flight number and also that 'you saw what happened to Jack Leonard' * * *." Leonard had received a beating and had been hospitalized.

In September, 1959, Leonard's club failed and went into bankruptcy. Since Leonard could no longer obtain nationally known fighters, he quit the boxing business.

Also in September the indictment against these appellants was returned.

The indictment contained ten counts. Two of the counts charged all of the appellants (together with unindicted co-conspirator William Daly) with conspiracy: Count 1 with a conspiracy to commit extortion;[4] Count 5 with a conspiracy to transmit threats by means of interstate communications.[5]

---

4. Paragraph 3 of this count reads as follows:

"The objects of such conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

"c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

"d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan."

5. Paragraph 3 of this count reads as follows:

"The objects of said conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to

In eight counts Appellants Carbo, Palermo and Sica were charged with substantive offenses. Carbo and Palermo were charged in Counts 3 and 2, respectively, with obtaining the sum of $1,725.00 from Leonard through threats of physical injury and violence. Palermo and Sica, in Count 4, were charged with attempts to coerce Nesseth through fear and threats of violence into giving up part of his contractual control of Jordan by signing a match with Sugar Hart. Carbo and Palermo, in Counts 6, 7, 8, 9 and 10, were charged with the interstate transmission of threats to injure Leonard and Nesseth.

By jury verdict all defendants were found guilty as charged. The following sentences were imposed:

Carbo: Imprisonment consecutively for twenty years on Count 1 and five years on Count 3, a total of twenty-five years, plus a fine of $10,000.00.[6]

Palermo: Imprisonment for fifteen years on Count 1, plus a fine of $10,000.00.[7]

---

victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth and Leonard Blakely without payment of considerations for the monies and control so received."

Subparagraphs c. and d. are substantially the same as those set forth in footnote 1 as to Count 1.

6. On Counts 5, 7 and 9, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the twenty-five years imposed for Counts 1 and 3.

7. On Counts 2, 4 and 5, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the fifteen years imposed for Count 1. Likewise, imprisonment consecutively for five years each on Counts 6, 8 and 10, a total of fifteen years, was made to run concurrently.

Sica: Imprisonment for twenty years on Count 1, plus a fine of $10,000.00.[8]

Dragna: Imprisonment on Counts 1 and 5 for five years each to run concurrently.

Gibson: Imprisonment on Counts 1 and 5 for five years each to run concurrently, plus a fine of $10,000.00. Imprisonment was then suspended and Gibson was placed on probation for a period of five years.

SUFFICIENCY OF THE INDICTMENTS.

Appellants make several attacks on the indictments.

First, it is contended that Counts 1 through 4 failed to allege offenses cognizable in the federal courts because there is no sufficient showing that the extortion charged affected commerce. It is asserted that neither a contract between one fighter and his manager nor a share of the fighter's purse constitutes commerce.

Under the Hobbs Act (as distinguished from the Sherman Act) it is not necessary that the subject of the extortion constitute commerce. All that is required is that trade or commerce be affected by extortion "in any way or degree." The quantum of effect under the Hobbs Act is thus entirely different from that required under the Sherman Act.[9]

This is clearly pointed out in United States v. Malinsky, S. D. N. Y., 1956, 19 F. R. D. 426, 428, denying a motion to dismiss an indictment for failure to allege with sufficient particularity the manner in which the claimed extortion affected commerce. There it was stated:

> "Whereas under that Act it may be that a court must find that the acts complained of have a direct and substantial effect on interstate commerce, under the

8. A sentence of five years on Counts 4 and 5 was made to run concurrently.

9. See Hulahan v. United States, 8 Cir., 1954, 214 F. 2d 441, 445, cert. den., 348 U. S. 856 (1954).

subject statute there is no need for such a finding. The statute provides that effect in 'any way or degree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. The substantiality of the effect is not left to judicial determination. * * * Congress quite understandably might prohibit extortion or conspiracies based on extortion which affect interstate commerce in any degree. Their corrosive quality is not likely to be subject to quantitative measurement to the same extent as the economic effect of combinations in restraint of trade."

In United States v. International Boxing Club, 1954, 348 U. S. 236, it was held that the business of promotion of professional championship boxing contests and the selling of rights to televise, broadcast and film such contests for interstate transmission constituted commerce within the Sherman Act.

Here it can hardly be denied that such commerce is affected in some degree by extortion to obtain control of a champion fighter. A sufficient effect on commerce under the Hobbs Act has then been charged.

Further attacking the sufficiency of Counts 1 through 4 to charge a federal offense, appellants contend that the Hobbs Act is vague and uncertain in its application to the boxing business and may not constitutionally be applied to the charged acts of extortion.

Undeniably the act was particularly aimed at labor racketeering, but by its terms it is not so limited.[10] Racketeering in other areas is clearly included. The language of the statute provides fair warning and adequate notice

10. The legislative history of the bill indicates that while most of the drafting problems presented by the bill related to its coverage of labor activities, the bill was broadly conceived of as part of a legislative plan to deter professional gangsterism. S. Rep. No. 1440, 73d Congress, 2d Session.

that extortion in any area is included so long as the necessary effect upon commerce results.

It is contended that Counts 1 and 5 fail to meet the requirement of Rule 7(c), F. R. Cr. P., that they provide "a plain, concise and definite statement of the essential facts constituting the offense charged." It is asserted that they do not allege how interstate commerce was to be delayed, obstructed or affected by the charged conspiracy; or how the threats charged could yield control of Jordan or a share of his purse; or what agency of interstate commerce was to be used to convey the alleged threats; or between what points these threats were to be communicated.

It is not necessary to plead such evidentiary detail.[11] Subparagraph 3 of each count clearly alleged the scheme for accomplishing the criminal goals of the conspiracy, including reference to the role each of the five defendants was to play in the attainment of these goals. This is sufficient.[12]

It is also contended that the substantive counts relating to the threatening communications did not charge offenses since they failed to contain any allegation determining venue.

Rule 7(c) does not require venue to be pleaded. Since it is waivable,[13] it is not an essential fact constituting the offense charged.[14] Defendants have the right to be tried in the proper forum, not the right to be charged with the proper venue.[15]

In this case a bill of particulars giving full details respecting venue was filed one month after the indictment

11. Wong Tai v. United States, 1927, 273 U. S. 77.

12. Schino v. United States, 9 Cir., 1954, 209 F. 2d 67, 69, cert. den., 1954, 347 U. S. 937.

13. Rodd v. United States, 9 Cir., 1948, 165 F. 2d 54.

14. See Rule 12(b)(2), F. R. Cr. P.

15. Suggestions by Carbo and Gibson that they were not tried in the proper state and district are not open to consideration since no motion for change of venue under Rule 21(b) was made below.

was returned. There was then no possibility of prejudicial surprise.[16]

The contention that § 1951 is not within the power of Congress and contravenes the Tenth Amendment was refuted in Nick v. United States, 8 Cir., 1941, 122 F. 2d 660, cert. den., 314 U. S. 687, reh. den., 314 U. S. 715, reh. den., 316 U. S. 710 (1942). The conspiracy and substantive offenses under § 1951 do not merge.[17] Nor is the § 371 conspiracy identical with the § 1951 conspiracy.

We conclude that in all respects of which the appellants complain, the indictments sufficiently charge the federal offenses to which they were directed.

Sufficiency of the Evidence.

All defendants assert a lack of substantial evidence of guilt upon all counts in which they were charged. Our discussion of this contention is, of course, subject to our later discussion of other assignments of error in which attack is made upon specific portions of the record.

Accepting the facts and the testimony as we have recited them, the contentions of Carbo, Palermo and Sica may be summarily dismissed as to the substantive counts. Their contentions are founded in large part upon an attack on the credibility of Leonard. We shall not disturb the jury's determination in this respect.

Likewise, as to the Count 1 conspiracy the evidence is amply sufficient as to these three appellants. Their active and joint participation in overt acts which themselves constituted substantive offenses leaves little doubt but that they knowingly acted in concert and pursuant to plan.

Likewise, as to the Count 5 conspiracy there can be no doubt but that Carbo and Palermo knowingly acted in concert and pursuant to plan.

16. Compare Bratton v. United States, 10 Cir., 1934, 73 F. 2d 795.

17. Callanan v. United States, 1961, 364 U. S. 587.

As to the Count 5 conspiracy there is no evidence that Sica and Dragna entered the plot before the interstate threats had been communicated and the conspiracy fully consummated. We find no evidence that they had any knowledge of the plot at the time of the interstate threats nor anything from which an inference of conspiratorial association or agreement at that time might be inferred. The jury's verdict upon Count 5 should have been set aside as to these appellants. As to Appellant Sica the court's failure to do this is without prejudice in the light of his twenty-year sentence imposed for Count 1 and the concurrent five-year sentence upon Count 4.[18]

As to Appellant Dragna, after careful consideration of the record we have concluded that there is no sufficient evidence to hold him guilty upon Count 1. The only evidence is as to the occasion on May 4, 1959, which we have recounted, when Dragna appeared with Palermo and talked to Leonard (plus evidence that Dragna and Palermo had been seen together a day or so earlier). On this occasion Dragna was simply asked what he thought and gave his opinion. Leonard, in testifying before the California Athletic Commission, described Dragna's participation as follows: "He didn't say anything, no threats. No—in fact, he was a very good gentleman there. He did very little talking. Listened."

There was nothing said which would suggest that Dragna was an interested party. There was nothing other than his presence with Palermo which could give rise to any sinister implications that he was lending his active support to a program of violence. The United States suggests that those having an underworld reputation have the burden of refraining from acting in such a fashion (or, it would seem, from being seen in association with others) when it might be construed as evincing an interested participation or a threat of violence. We cannot agree. Leonard may have been wholly justified in the conclusions he drew, but it does not

18. See Hirabayashi v. United States, 1943, 320 U. S. 81.

follow that Dragna may be held criminally responsible for those conclusions.

As to Appellant Dragna the district court must be reversed and the sentence set aside.

As to Appellant Gibson, charged in the conspiracy counts, it must be noted that there are in fact two distinct conspiracies involved in the facts of the case. (1) The underlying conspiracy to gain control of Jordan. For business reasons of his own, Gibson was interested in furthering Carbo's ends in this respect and it is clear that the evidence is sufficient to connect him with this underlying conspiracy. (2) The *charged* conspiracies to accomplish the underlying purpose by extortion and threatening communications.

The United States suggests that proof of the first is sufficient without more to constitute proof of the second. This is vigorously disputed by Gibson, who contends with justification that the existence of business relations with Carbo is in itself wholly consistent with innocence of the charged conspiracies.

The United States further emphasizes the fact that Gibson himself was guilty of acts of economic coercion in making it clear on at least two occasions that should Jordan sign with Sugar Hart Leonard's economic difficulties would be over, but that unless such a fight took place Gibson would be unable to save the Hollywood Boxing and Wrestling Club.

There can be little doubt that Gibson had his own business reasons entirely apart from those of Carbo and Palermo for wishing such a fight to take place. The question is whether the record can support a determination that for these independent business reasons Gibson became a party to the Carbo-Palermo scheme for achieving control of Jordan through extortion and threats. In our view it does through proof of Gibson's connection with Daly.

Gibson brought Daly to Los Angeles in order to confer with Leonard and delegated Daly to act as his representa-

tive in discussions with Leonard. Gibson advised Leonard to this effect. One may logically conclude that in what Daly said, he spoke for Gibson and what he said related to Carbo and Palermo and was calculated to frighten Leonard into renewed efforts with Nesseth.

Accordingly, we conclude, subject to later discussion of specific points, that while judgment must be reversed as to Appellant Dragna the evidence is sufficient to support the jury verdict as to Appellants Carbo, Palermo and Gibson and, as to Appellant Sica, the verdict on Counts 1 and 4.

DECLARATIONS OF CO-CONSPIRATORS.

A substantial part of the proof on the conspiracy counts consisted in what various of the co-conspirators out of court had said about their fellow conspirators. All appellants have most vigorously protested the admission of such declarations as hearsay and have contended that the district court failed adequately to instruct the jury respecting the conditions under which such declarations may be used against conspirators other than the declarant.

It is well established that the declarations of one conspirator in furtherance of the objects of the conspiracy, made to a third party, are admissible against his co-conspirators.[19]

It is also well established, however, that such declarations are admissible, over the objection of a co-conspirator who was not present when they were made, only if there is proof independent of the declaration that he is connected with the conspiracy. Glasser v. United States, 1942, 315 U. S. 60, 75: "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

The following instruction was offered and was rejected:[20]

19. Logan v. United States, 1892, 144 U. S. 263, 309.

20. The district court in its charge to the jury did deal with the substance of this instruction as to Appellant Gibson. It charged:

"You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of

"'You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the tentative basis is destroyed and all such testimony must be ignored as to him.

"A defendant's connection with a conspiracy must be established beyond a reasonable doubt, accordingly, by his own conduct and his own statements or declarations."

We cannot accept appellants' view of the law as set forth in the proposed instructions. The declarations, as to defendants other than the declarant, constitute hearsay. Yet with a proper foundation they would qualify under the well recognized exception which permits the introduction of declarations of a co-conspirator.[21] The problem of co-

any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy."

Also, in admitting certain declarations of Appellant Palermo, the court stated:

"I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the conspirators. But that rule only applies if there are co-conspirators.

"Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator."

21. The necessary foundation consists of three distinct prerequisites. First: that the declaration is in furtherance of the con-

conspiratorial declarations, then, is one of the admissibility of evidence under a well recognized exception to the hearsay rule. It is not a substantive question as to the qualitative sufficiency of the evidence necessary to prove the existence of a conspiracy.[22]

The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits.[23] The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law, as set forth in the proposed instructions, is that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.

Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon

spiracy; second: that it was made during the pendency of the conspiracy; third: that there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it. See authority, infra, footnote 22; Uniform Rules of Evidence, 63(9); Model Code of Evidence, Rule 508(b). Only the third element is controverted here, save as may hereafter be discussed.

22. See: 4 Wigmore, Evidence (3d Ed., 1940) § 1079; see generally: Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 984-989 (1959); Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954).

In analyzing this question, every case that has come to our attention has done so from the point of view of whether the declarations were "admissible" or "competent" evidence. Most recently in Wong Sun v. United States, 1963, — U. S. —, —, the Supreme Court has recognized that "the rule which regulates the use of out-of-court statements is one of admissibility, rather than simply of weight, of the evidence."

23. See discussion, Maguire and Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence, 1927, 40 Harv. L. Rev. 392, 415.

their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declarations at all. The district court in effect will have told the jury, "You may not consider this evidence unless you first find the defendant guilty."

The point is made in United States v. Dennis, 2 Cir. 1950, 183 F. 2d 201, 230-231, affirmed 1951, 341 U. S. 491, where it is stated:

> "It is difficult to see what value the declarations could upon that hypothesis the declarations would merely have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for serve to confirm what the jury had already decided. In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all."

In Rowley v. Braly, 1926, Texas Civil Appeals, 286 S. W. 241, 245, the same thought is expressed:

> "If the conspiracy is established, then what purpose can the declarations and statements introduced in evidence serve? * * * If this [rule giving the determination to the judge] is not correct, of what avail would the proof of such declarations be to the party offering them."

Finally, Maguire and Epstein, supra footnote 23, at page 407 (their footnote 47), agree that:

> "If the other evidence satisfies the jury that the conspiracy has been entered into, the co-conspirator's declarations can fulfill no useful function."

We find the quoted authorities persuasive. To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt. It will not do to tell the jury that it must reach its determination first.

The rule of law for which appellants contend would, then, effectively condemn this entire exception to the hearsay rule. This result we must reject.

Nor could this exception be rescued by giving the preliminary question to the jury to be decided by it upon the basis of a prima facie case rather than proof beyond a reasonable doubt. The jury is already concerned with the evidence-weighing standards involved in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence, separating that produced by the declarations from all other, but as well to apply to the independent evidence the entirely different evidence-weighing standards required of a prima facie case, is to expect the impossible. As stated in Dennis, supra at page 231:

> "Indeed it is a practical impossibility for laymen and for that matter for most judges to keep their minds in the isolated compartments that this requires."

Indeed, the injection of the standards of a prima facie case into a jury determination (even though carefully isolated, by instructions, from the ultimate determination of guilt) might very well be found to cause confusion as to standards of proof highly prejudicial to the defendant.

Therefore, we adopt in this situation the orthodox prevailing view of the allocation of functions between judge and jury, which assigns to the judge decisions upon preliminary questions of fact determinative of the admissibility of evidence challenged under technical evidentiary rules.[24]

Our position is supported by language in United States v. Dennis, supra at page 231:

> "The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any

24. See Maguire and Epstein, supra.

issues of fact on which the competence of evidence depends, and that if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent."

It is for the judge then, and not the jury, to determine the admissibility of the declarations. In making this determination the test is not whether the defendants' connection had by independent evidence been proved beyond a reasonable doubt, but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made. Thereafter it is the jury's function to determine whether the evidence, including the declarations, is credible and convincing beyond a reasonable doubt.

The trial judge's finding on admissibility in no way restricts the jury's inquiry into guilt or innocence. As stated in United States v. Dennis, supra at page 231, quoting from United States v. Pugliesi, 2 Cir., 1945, 153 F. 2d 497, 500:

> "'The admissibility of the wife's declarations in the case at bar was for the judge, and the fact that the jury later acquitted her was irrelevant. The issue before him was altogether different from that before them: he had only to decide whether, if the jury chose to believe the witnesses, Pugliesi and his wife were engaged in a joint undertaking; they had to decide whether they believed the witnesses beyond a doubt.' No doubt, this conclusion permits the jury to act upon hearsay, because they may be satisfied of the 'joint undertaking' only because of the declaration; but it often happens that hearsay is competent, and this is the only practicable way to deal with the question."

It must be conceded that in many cases instructions such as that proposed by appellants have been held proper

We know of no case save one,[25] however, in which the failure to give such an instruction has been held error. Cases cited by appellant as holding to this effect we find distinguishable.[26]

Appellants assert that there was a lack of a prima facie case made out by independent evidence and that the declarations were inadmissible for this reason. We cannot agree. There was ample as to each appellant, as the district court on motion for new trial noted.

We conclude that it was not error to admit against the appellants the declarations of their co-conspirators, nor to fail to give the requested instruction.

ELECTRONIC RECORDINGS AS EVIDENCE.

Three electronic recordings of conversations were received in evidence over appellants' objection.

The Daly-Leonard conversation on May 14, 1959, was recorded by two independent methods. Leonard was equipped with a Minifon, a miniature wire recording device. The wire recording made on Leonard's person by this method was received in evidence. Leonard also was equipped with a miniature radio transmitter. The con-

25. In Schmeller v. United States, 6 Cir., 1944, 143 F.2d 544, hearsay documents had been admitted in absence of an establishment of a prima facie case by independent evidence. The court agreed with defendants that the jury should not rightly have considered the hearsay evidence, but instead of noting error in the judge's failure to remove the evidence from jury consideration by an erasure instruction when the necessary showing had not been made, the court placed the blame on the judge's failure to instruct the jury to try the admissibility point for themselves. We cannot agree with this solution. When no prima facie case is made out, the rights of the defendants can hardly be protected by permitting the jury to find that the evidence was nonetheless admissible.

26. Lutwak v. United States, 1953, 344 U. S. 601, dealt with declarations not in furtherance of the conspiracy, which, it is well recognized, are limited in their application to the declarer alone. Oras v. United States, 9 Cir., 1933, 67 F. 2d 463, where an instruction was held erroneous, involved lack of a prima facie case aliunde the declaration.

versation was picked up in a neighboring room through a radio receiver and was there recorded on tape.

Appellants contend that these exhibits were inadmissible since they were secured in violation of the Fourth Amendment. They assert that Leonard obtained access to Daly's room under false pretenses amounting to an unlawful search and seizure.

We have held to the contrary upon this point in Todisco v. United States, 9 Cir., 1961, 298 F. 2d 208, cert. den., 1962, 368 U. S. 989. Appellants request us to reexamine our decision in that case and overrule it. We decline and adhere to our opinion as there expressed.[27]

Appellants further claim that these exhibits were inadmissible because secured contrary to 47 U. S. C. § 301, which provides that "no person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * *, except * * * with a license in that behalf * * *." Although Leonard had no license, "no policy against admission of evidence secured by the radio operation can be said to arise from such lack." Todisco v. United States, supra at page 211.

On May 5, 1959, Palermo telephoned Leonard at his home, and attempted to persuade him to come to a restaurant where Palermo and Sica were waiting for him. Palermo told Leonard that he had been contacted by Carbo and that he and Leonard had to place a call to Gibson. This conversation with Palermo was recorded by Leonard with the aid of a Los Angeles police officer through an induction coil placed inside Leonard's home telephone.

Appellants contend that this recording was inadmissible in evidence since it constituted a violation of 47 U. S. C. § 605.[28] We disagree.

27. Accordingly, we find it unnecessary to discuss the question of whether these appellants have standing to assert a violation of Daly's constitutional rights.

28. "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence,

In Rathbun v. United States, 1957, 355 U. S. 107, it was held that the contents of a conversation overheard on a regularly used telephone extension with the consent of one party to the conversation did not constitute an unauthorized interception.

Appellants would distinguish Rathbun upon the ground that use of an induction coil constitutes, mechanically, a physical interception which is not the case with a regularly used extension phone. Again we disagree. As the record demonstrates, the induction coil is placed against the side of the telephone instrument where it serves as a listening device much in the nature of a tuning fork. There is no physical connection with or interruption of the telephone electrical circuit.[29]

But further, we do not understand that the mechanical nature of the method of overhearing is now to be the guidepost in this area. The controlling principles, it would seem, are substantially the same as those which guided us in Todisco.

In Rathbun, at page 110, it is stated:

> "The clear inference [from the language of § 605] is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those

---

contents, substance, purport, effect or meaning of such intercepted communication to any person * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purpose, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *".

29. Appellants further suggest that use of the induction coil violates some regulation of the Federal Communications Commission. No objection on this basis was made at trial and we are not referred to the regulation in question.

who believe the conduct here violates Section 605 that either party may record the conversation and publish it. The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose."

We find no distinction between holding out the handset and permitting an outsider to hear through the use of an induction coil.[30]

Nor does the recording of this legally overheard conversation render the overhearing and divulging of the conversation improper.[31]

We conclude that it was not error to receive these recordings in evidence.

SICA'S UNDERWORLD REPUTATION.

Sica moved to dismiss the indictment against him (Counts 1 and 5) for the reason that he was unduly prejudiced by the charge in Paragraph 3(c) (see footnotes 4 and 5) that the conspiracy contemplated the use of "persons known to said victim to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence" and the enlistment of Sica for this purpose. The motion was denied. Sica also objected to the introduction of testimony by Leonard and Nesseth to the effect that by reputation they knew of Sica as an "underworld" man and a "strong-arm" man. The objection was overruled. Sica assigns error in these respects.

30. See Ferguson v. United States, 10 Cir., 1962, 307 F. 2d 787; Carnes v. United States, 5 Cir., 1962, 295 F. 2d 598, cert. den., 1962, 369 U. S. 861.

31. Carnes v. United States, supra, at page 602; see also Hall v. United States, 5 Cir., 1962, 308 F. 2d 266, cert. den., 1963.

In discussing the admissibility of evidence of bad moral character the Supreme Court in Michelson v. United States, 1948, 335 U. S. 469, 475, states:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[32]

The subjects of confusion of issues and unfair surprise will be discussed later.

Whether in this case prejudice was undue would seem to us to depend upon the purpose served by the charge, and the issue to which the prejudicial evidence was relevant, and a consideration of the probability of harm to the defendant in the light of these facts.

The nature of Sica's reputation was not introduced into the case for the purpose of characterizing him as a

32. See also: 1 Wigmore, Evidence, 3d Ed., 1940, §§ 55, 57; Uniform Rules of Evidence, Rule 47; Model Code of Evidence, Rule 306(1).

bad man likely to resort to the conduct with which he is charged. This was not the source of its relevance.

Instead the prosecution relied on the reputation of Sica as a probative fact enabling the jury to infer that Sica had intervened with Leonard and Nesseth knowing that his presence would instill fear in them and intending to manipulate this fear for the benefit of Carbo and Palermo; and further, to conclude that Carbo and Palermo had secured Sica's participation with full realization that his effectiveness was based upon the fear his reputation could inspire in the victims.

In cases of extortion based upon fear of violence the facts of fear, actual or anticipated, and of its reasonableness, are vital factors. To prove a substantive act of extortion it is essential to show the generation of fear in the victim.[33] To prove a substantive act of attempted extortion it is necessary to prove an attempt to instill fear. To prove a conspiracy to extort it is necessary to show a plan to instill fear.

Here Sica stood in the position of a dangerous weapon to be used to strike fear into the hearts of Leonard and Nesseth. It was part of the prosecution's case to charge and to prove that the conspirators considered Sica to occupy this position. That Leonard and Nesseth considered him to be dangerous and that fear reasonably resulted from his appearance because of his reputation constituted relevant facts upon this part of the prosecution's case: "* * * there is a rational connection between the existence of the criminal agreement—'the partnership in crime'—and the fact that the acts upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed * * *." United States v. Com-

33. Bianchi v. United States, 8 Cir., 1955, 219 F. 2d 182, 188-190, cert. den., 349 U. S. 915, rehearing den., 349 U. S. 969; Nick v. United States, 8 Cir., 1941, 122 F. 2d 660, 671, cert. den., 314 U. S. 687, rehearing den., 314 U. S. 715, reh. den., 316 U. S. 710. See United States v. Compagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U. S. 867, rehearing den., 325 U. S. 892.

pagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U. S. 867 (1945), reh. den., 325 U. S. 892 (1945).[34]

It is true that (despite the precautionary steps taken by the judge as later discussed) the jury may have permitted this evidence to bear upon the probability of Sica's guilt. The question is whether this possibility renders such evidence unduly prejudicial and inadmissible. If so, the United States is precluded from establishing a material part of its case.

The question then is not whether the United States may use Sica's reputation as a sword against him, but whether he may himself make use of it as a shield to immunize himself from proof of the means by which the conspirators planned to frighten their victims into sub-

34. In this case Judge Learned Hand, disagreeing with the majority of the court, found the fact of fear irrelevant in a conspiracy case, although agreeing to its relevance in a case of substantive extortion. It does not appear from that case, however, that the plan of the conspirators was to instill fear in their victims. The opinion states at page 526:

> "So far as appears they did not expressly threaten violence but confined themselves to a pretense of union activity; they threatened to call strikes against their victims unless they were plentifully paid."

Judge Hand was of the view that evidence of the victim's fear of acts of violence incidental to the strike was irrelevant and inadmissible in absence of any showing that this fear was communicated to the conspirators.

Accepting that Judge Hand's minority view might have merit under the circumstances of that case, the situation appears entirely distinguishable from that at bar.

Here it is charged that fear of Sica was intended to serve as the very source of coercive power and the use of west coast enforcers had been expressly threatened. Furthermore, the victims' fearful states of mind here were fully disclosed to every one of the conspirators. Gibson from the outset knew that Leonard and Nesseth were apprehensive that Carlo and Palermo would resort to force and was requested by Leonard to intervene after Sica entered the picture. Palermo admitted knowledge that Leonard and his wife were frightened. Sica, himself, noting Leonard was taken aback by his presence, had asked Leonard whether "you feel there's some type of repercussions by me coming in here?"

mission. If he may, then all who are known to live by violence are free to extort by the tacit threat of violence conveyed by their reputations; for the reasonableness of the resulting fear, as determined by its cause, may not be presented to the jury.

We cannot accept this result as a sound balance of the conflicting interests involved.

This, in our judgment (with such safeguards as were taken by the trial judge), is a proper case for application of what has been termed the "multiple admissibility doctrine." As stated in 1 Wigmore, Evidence (3d Ed., 1940) § 13, page 300:

> "When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensible as a practical rule."

In State v. Belisle, 1920, 79 N. H. 444, 111 Atl. 316, 317, this doctrine was applied. There defendant Lyman was charged with assault upon a policeman. The victim, Fox, had sought to defend himself by drawing a gun. To justify this defense he was permitted to testify that Lyman was, Fox believed, a man who would resort to force. The court stated:

> "The argument that the disposition, character, and reputation of Lyman are not evidence that he assaulted Fox is sound. The difficulty with the defendant's case is that, while the evidence was not admissible for that purpose, it was clearly admissible to prove the reasonableness of the mode of defense from threatened attack adopted by Fox. As the evidence was admissible

for some purpose, a general exception to it was unavailing."

To avoid confusion of issues and to foreclose the jury from using the reputation evidence to convict defendants on the "bad man" theory, the court below, upon admitting the testimony in question, instructed the jury as to the limited consideration which might be given.[35] The subject was again dealt with in the court's charge to the jury. We have no doubt but that to the maximum extent possible, prejudice flowing from any confusion of issues by the jury was eliminated.

There can be no question of unfair surprise. A pretrial offer of proof upon this matter was made by the prosecution thirteen months before the trial commenced.

We conclude that the district court did not err in denying Sica's motion to dismiss the indictment or in admitting the evidence of Sica's reputation.

---

35. "* * * there is an old basic principle in American law respecting the trial of criminal cases, and that is that the reputation of a defendant is just not the thing in issue. You are trying a specific charge or a specific group of charges that are set forth in the indictment.

"Now, a person who is, generally speaking, a fine upstanding citizen might occasionally go out and commit an occasional crime, and a man who has a bad reputation might never commit one. He might not deserve the reputation, because reputation is something different from character. Character is the quality of person you are and reputation is what is believed in certain quarters regarding certain aspects of your life. It might be justified. It might not.

"So it would be very easy, unless the jury disciplines itself to consider the evidence for the purpose for which it is admitted, to get off on the track of whether or not a particular defendant has a reputation of a certain kind or other.

"Now, it is contended here by the Government that this witness Leonard was put in fear of Mr. Sica and I think they are entitled to show or have Mr. Leonard tell why he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way."

ANONYMOUS THREATENING TELEPHONE CALLS.

In our statement of the facts we have recounted the receipt by Don Chargin of an anonymous telephone call just prior to his leaving for Los Angeles in connection with negotiations with Leonard to take over the Hollywood Boxing and Wrestling Club. The caller warned Chargin to stay out of Hollywood.

Appellants objected to this testimony as irrelevant for lack of connection to any of the appellants and highly prejudicial. After a considerable discussion of the objection out of the presence of the jury, the court concluded:

> "I think the problem will be one for the jury. I have an ancillary problem, to properly instruct them. You are invited to submit instructions on it, but the objections are overruled."

The jury was then advised by the court:

> "The jury must of course bear in mind that the witness says this is anonymous. Now, what's anonymous ordinarily in life doesn't mean much, but sometimes what is anonymous is anonymous in form and you can fit it into the context of things. Whether this is the first situation or the second is going to depend upon the total context of the case, and just don't go deciding the issue on it until you have heard all the evidence and the instructions."[36]

Admission of this testimony under the circumstances is assigned as error.

The fact that Chargin could not identify the speaker does not necessarily render this testimony inadmissible. If identity could be found by the jury from other circumstances, admission of the testimony was proper.

The issue of authenticity—the identity of the author of a particular item of evidence such as a document or phone call—is for the jury once a prima facie case of authorship

36. No instructions upon this subject were offered.

is made out by the proponent of the evidence.[37] The connection between a telephone call and the caller may be established circumstantially.[38] The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that a jury, acting as reasonable men, could find its authorship as claimed by the proponent. The scope of appellate review upon this issue is confined to determining whether the admission constituted abuse of judicial discretion in determining that a prima facie case had been made out.[39]

Upon the record we cannot say that the admission of this testimony constituted abuse of discretion.

Daly, a member of the conspiracy, had told Leonard that this warning would most likely be given by the conspirators and why. A month prior to the warning Sica had surreptitiously contacted Leonard's assistant and attempted

37. United States v. Tellier, 2 Cir., 1958, 255 F. 2d 441, cert. den., 358 U. S. 821, (1958). See 7 Wigmore on Evidence, § 2135, McCormick on Evidence, § 194, Model Code of Evidence, Rule 601(a) (1942). That the procedure for handling the issue differs from that which we found proper with respect to declarations of co-conspirators is explained by the text writers. McCormick, supra at page 407, states:

> "It must be noticed, however, that authenticity is not to be classed as one of those preliminary questions of fact conditioning admissibility under technical evidentiary rules of competency or privilege. As to these latter, the trial judge will permit the adversary to introduce controverting proof on the preliminary issue in support of his objection, and the judge will decide this issue, without submission to the jury, as a basis for his ruling on admissibility. On the other hand, the authenticity of a writing or statement is not a question of the application of a technical rule of evidnece. It goes to genuineness and relevance, as the jury can readily understand, and if a prima facie showing is made, the writing or statement comes in, with no opportunity, then for evidence in denial. If evidence disputing genuineness is later given, the issue is for the jury."

38. Andrews v. United States, 10 Cir., 1935, 78 F. 2d. See 7 Wigmore on Evidence, § 2155(1)(b).

39. See Wigmore on Evidence, § 2135 and cases cited therein; McCormick on Evidence, § 194.

to have him ascertain when Chargin planned to be in town and where he could be reached by telephone.

These facts, plus the manner in which the warning so obviously fitted into the conspiracy scheme, are sufficient to warrant reasonable men in concluding that the telephone call had been made by or at the direction of one of the conspirators in furtherance of the conspiracy, and thus, irrespective of the precise identity of the speaker, was binding on all appellants.

Appellants also assert as irrelevant and prejudicial Leonard's testimony to the effect that he had received threatening telephone calls between May 20 and November 1, 1959.

This testimony was given on re-direct examination. On cross-examination appellants had attempted to impeach Leonard's credibility by showing that he had through his wife corruptly expressed a willingness to suppress his testimony and depart the country if he were paid $25,000.00.

On redirect examination the United States sought to explain this offer as founded not on corruption but on fear. The testimony of the threatening telephone calls was relevant to this issue and constituted a proper method of rehabilitating the witness.[40] The resulting prejudice was carefully minimized by the prosecution. The contents of the calls were not divulged to the jury.

We conclude that it was not error to permit testimony as to the anonymous threatening telephone calls.

Miscellaneous Matters of Evidence.

Sica asserts as error the admission of testimony given by Leonard with reference to one Tom Stanley. Leonard testified that Stanley, a friend of Sica's had called on him on occasions at about the time the indictments were handed down, seeking to persuade Leonard not to give testimony in appellants' trial. On two occasions Stanley had been

40. See Bracey v. United States, D. C. Cir., 1944, 142 F. 2d 85, 89, cert. den., 322 U. S. 762; 4 Wigmore on Evidence, § 1119; McCormick on Evidence, § 49.

accompanied by one Steve Calla. Stanley had stated to Leonard that Calla was a friend of Sica's and a convicted murderer. In Leonard's words, "He said Mr. Calla had been in the penitentiary in Cleveland for murder and I said 'Murder?' He said 'Yes, he beat them to death. He was a strong-arm man.'"

Sica contends that this testimony by Leonard of conversations had with Stanley constituted hearsay.

There can be no question but that the testimony was inadmissible for the purpose of establishing that what Stanley had said was true. It was not admitted for this purpose, however. Its purpose was to impeach and discredit Stanley as a witness.

Stanley had been called as a witness by Sica and had given testimony which, if believed, would have reflected upon the credibility of Leonard. The government sought to show bias and complicity upon Stanley's part; that even though he was not named as a co-conspirator, he was actively engaged in furthering the ends of the conspiracy.

Also, as in the case of the anonymous telephone threats to Leonard, the testimony had the purpose of showing Leonard's state of mind at a time when he was charged with having corruptly proposed to appellants that for a consideration he would avoid the giving of testimony by leaving the country.

In both these respects the testimony was relevant and competent.[41] The question was not whether what Stanley said was true but whether Stanley had said it. This was made clear by the court in an admonition to the jury.

We find no error in the admission of this testimony.

Sica charges the government with misconduct in asking on cross-examination whether he had been convicted of the crime of bookmaking.

On direct examination Sica had testified with respect to his felony record and had admitted to two convictions. On cross-examination he had admitted a third. He was then

41. See 3 Wigmore on Evidence, §§ 948-949, 956, 960.

asked whether in 1951 he had been convicted of a conspiracy to violate certain sections of the Penal Code of California relative to bookmaking. In colloquy following objection by Sica's counsel, it appeared that although the exemplified copy of judgment in the government's possession denominated the crime as a felony, a misdemeanor type of sentence had been imposed rendering the conviction one for misdemeanor.

Counsel for Sica then moved to strike the question and asked the court to instruct the jury to disregard it. This the court did to the express satisfaction of Sica's counsel, who conceded that the government apparently had acted in good faith. The following day Sica's counsel, reversing his judgment as to the good faith of the government, moved for mistrial. The motion was denied.

In our judgment, the court acted properly. We note that the question under attack never was answered. We have difficulty finding any prejudice. Sica had admitted three felony convictions including robbery. A jury suspicion that he may also have been convicted of a misdemeanor would not seem to add measurably in the credibility balance. Furthermore, the admonition of the judge was clear and commanding and in our judgment was an adequate remedy.

We conclude that it was not error or abuse of discretion to deny Sica's motion for mistrial.

Nesseth and one other witness, McCoy, were permitted over objection to testify to conversations had with Leonard, during which Leonard had recounted to them the threatening statements made to him by Carbo. Carbo asserts that this testimony was inadmissible as hearsay.

Leonard had already testified to the fact that these threats had been made. The testimony of Nesseth and McCoy was relevant proof of the state of mind of Leonard and of the effect which the threats had had upon him. It was competent evidence for this purpose and its admission was not error.

Appellants assert error in the admission of testimony by Leonard as to extortionate demands by Carbo not related to those here in issue. In our judgment, these were relevant in bearing upon intent and in showing Carbo's general plan or scheme to dominate the boxing field.[42]

Carbo in his briefs has listed fifteen items of evidence which he contends were irrelevant and prejudicial. As to the bulk of these we do not regard them as irrelevant. To the extent that they were we find no prejudice. In any event, they did not form the basis of any assignment of error.

Appellants contend that evidence of the Daly-Leonard conversation should not have been admitted since that conversation did not serve to further the conspiracy. We think it obvious that it did.

Charge to the Jury.

Rule 30, F. R. Cr. P., provides that any party may file requests for instructions and that "the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed."

Appellants filed extensive requests for instructions. The district court advised appellants that he rejected all requests in the forms submitted because of their prolixity and confusing draftsmanship. He did not take issue with the propositions of law so presented, but refused to inform counsel as to the precise form his charge would take. Appellants assert that this is a violation of Rule 30 and reversible error.

Assuming arguendo that this constituted a violation of the rule as strictly read, we find no prejudice. The charge was proper, as we shall discuss. Appellants' arguments to the jury consumed four days and no suggestion has been given us as to how they might have been made more effec-

42. See Bush v. United States, 9 Cir., 1959, 267 F. 2d 483, 489; 2 Wigmore on Evidence, §§ 300, 302, 304.

tive had the court fully and precisely disclosed the substance of its charge. Therefore, we find no reversible error.[43]

In one respect appellants were placed at a disadvantage by virtue of the court's method of procedure: It was rendered difficult for them to comply with the requirement of Rule 30 that error in the giving of instructions may not be asserted unless objection is made before the jury retires to consider its verdict. The government here asserts that appellants are foreclosed by this provision of the rule from asserting error in the charge. In our judgment, this provision should not apply under such circumstances as we find here. We therefore proceed to a consideration of those errors assigned by appellants relative to the charge.

Appellant Gibson presented evidence of good character and assigns as error the district court's failure to instruct the jury that such evidence alone may create a reasonable doubt of guilt.

Upon this proposition of law the circuits are divided. The Tenth (joined by the Seventh) holds in accordance with Gibson's contention.[44] The remaining circuits do not require any more than that the jury be freely permitted to consider character evidence along with all other evidence upon the issue of guilt.[45] Such is the rule in this circuit.[46]

It is in the interpretation of Edgington v. United States, 1896, 164 U. S. 361, that the circuits appear to differ. There the Supreme Court stated, at page 366:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when

43. Watada v. United States, 9 Cir., 1962, 301 F. 2d 869, 870.

44. Peterson v. United States, 10 Cir., 1959, 268 F. 2d 87.

45. See footnote 3 of the Peterson case, supra (our footnote 44) at page 89.

46. Kaspar v. United States, 9 Cir., 1955, 225 F. 2d 275, 278-279.

considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

In support of Gibson's position, a dictum in Michelson v. United States, 1948, 335 U. S. 469, 475, referring to the privilege of introducing character evidence states:

> "This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. Edgington v. United States, 164 U. S. 361."

Edgington, however, did not say or suggest that character evidence is so highly probative that it must, upon penalty of reversal, be singled out from the bulk of the testimony for special treatment. In Edgington the court was faced with an instruction which confined the jury's consideration of character evidence to cases where the evidence was in conflict or where the rest of the evidence created a doubt of guilt. It held such limitation improper. It did not hold that the lack of limitation must be expressly pointed out to the jury.

Here the district court charged:

> "The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole."

The court went further, however, even approaching Gibson's proposed instruction. It gave as an example a Governor of the State of New York accused of robbery and,

with repeated reference to this example, pointed out that "it would be very, very unlikely that a person of that reputation would be out as a stick-up man." It thus strongly suggested to the jury that it might find it improbable that a man of good reputation would commit a particular crime.[47]

Under the view of the law adopted by this court, the instructions upon this point were adequate.

Appellants claimed that the trial court failed to make a finding that the defendants' activities complained of affected interstate commerce so as to sustain federal jurisdiction. The judge instructed the jury that "if boxing matches are in fact televised and television is sent into other states, that brings it within ambit of interstate commerce." This was sufficient.[48]

Appellants assert error in the instruction relative to the necessity for proof of overt acts in order to establish conspiracy under § 371. The court charged

> "It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid."

Appellants contend that it was error to tell the jury that an act done at the direction of the defendants or with their aid would satisfy the requirement.

We disagree. 18 U. S. C. § 2(b) recognizes the principle of criminal agency in the federal law. It provides:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

---

47. Compare Alverez v. United States, 9 Cir., 1960, 282 F. 2d 435, 436.

48. Hulahan v. United States, 6 Cir., 1954, 214 F. 2d 441, 445-6, cert. den., 348 U. S. 856 (1954).

Furthermore, an instruction in accordance with appellants' views was given elsewhere in the charge. While appellants contend that this constitutes at best a conflict between instructions, we find no prejudice resulting. Since both Carlo and Palermo were found guilty on their substantive counts, the jury clearly found that overt acts had been committed by these defendants on both conspiracy counts.

Appellants assert that an instruction on aiding and abetting was confusing. We do not find it so. They assert that the court failed to instruct clearly on reasonable doubt. We regard the charge as perfectly clear. They criticized the court's explanation of the division of functions between court and jury as tending to lull the jury into a sense that their responsibility was not final. We disagree. We find no merit in appellants' complaint that the court failed to define the term "underworld."

MISCELLANEOUS ASSIGNMENTS OF MISCONDUCT, VIOLATION OF DUE PROCESS AND OTHER MATTERS.

Appellants assert that they were denied due process because the prosecution permitted false evidence to go uncorrected.

Leonard was caught up in a falsehood with reference to his alleged solicitation of hush money from appellants. He testified that it was his wife and not he himself who had acted in this respect. A tape recording of a conversation between Leonard and Palermo, introduced by appellants, demonstrated the contrary. Appellants' position is that the government thus solicited false testimony and failed adequately to apprise the jury of the truth, relying on Napue v. Illinois, 1959, 360 U. S. 264.

In that case denial of due process lay in the fact that the truth, known to the prosecution to be contrary to its witnesses' testimony, was never brought home to the jury. Here the truth, known to the defendants, was brought home

to the jury in the most effective possible way. Furthermore, government counsel in argument to the jury conceded that Leonard was not testifying truthfully in this regard.

Defendants appear to be contending that when a government witness has been discredited in one respect, the United States is obligated to disown him. We disagree. When the falsity of testimony is brought home to the jury, it remains the jury's function to determine to what extent that witness' testimony is otherwise worthy of belief.

Gibson contends that he was promised that his indictment would be dismissed. We find no substantial or credible evidence tending to show such a promise. In other respects, appellants protest that there was misconduct and deprivation of fair trial; alleged distortion of evidence by the government in closing argument; permitting Nesseth and McCoy to sit before the bar of the court during closing arguments so that government counsel might point them out; the court's interrupting Carbo's counsel with questions during his argument. In none of these matters do we find merit.

Appellants contend that they have been denied due process and equal protection of the laws through denial of bail during trial. These contentions have already been made to this court in two prior appeals and there disposed of.[49]

Gibson, being of the colored race, asserts that unconstitutional discrimination occurred in the selection of the jury venire through systematic exclusion of Negroes. There was no proof of exclusion; only of the fact that out of fifty veniremen none was a Negro. Testimony of the clerk of the court as to the manner of selection effectively refuted this contention, and Gibson's offered proof of racial population statistics would not have been persuasive to the con-

49. Carbo v. United States, 9 Cir., 1961, 288 F. 2d 282; Carbo v. United States, 9 Cir., 1961, 288 F. 2d 686, cert. den., 1961, 365 U. S. 861.

trary. "Purposeful discrimination is not sustained by showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals." Akins v. Texas, 1945, 325 U. S. 398, 403.[50]

Appellants contend that the district court's method of handling challenges to the jury violated Rule 24(b) in that it did not assure the defendant their minimum number of challenges. The district judge required each side simultaneously to submit their challenges in writing to the clerk. The same juror might thus have been challenged by both sides. This is not improper.[51]

Gibson asserts that he was allowed only one challenge as to the three alternate jurors while Rule 24(c) grants him two challenges. This matter, however, was never presented to the district court and must be considered as waived.

Gibson contends that he was improperly denied severance. We disagree. The substantive counts in which Gibson was not charged still constituted overt acts attributable to him on the two conspiracy counts in which he was charged.

Rulings of the Successor Judge.

Following trial and jury verdict and while motions for new trial by all appellants and a motion for acquittal by Appellant Dragna were pending before him, Judge Ernest A. Tolin, the trial judge, died. Judge George H. Boldt was assigned to succeed him. A supplemental motion for new trial was made by all appellants under Rule 25, F. R. Cr. P.,[52] upon the ground that judicial duties in the

50. See also Cassell v. Texas, 1950, 339 U. S. 282, 286-7.

51. Pointer v. United States, 1894, 151 U. S. 396, 412; Hanson v. United States, 9 Cir., 1959, 271 F. 2d 791, 792-3.

52. "If by reason of absence from the district, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the

case could not be properly performed by a successor judge. All motions were denied and Judge Boldt proceeded to impose sentence. This is assigned as abuse of discretion.

Appellants rely heavily upon dicta in Connelly v. United States, 8 Cir., 1957, 249 F. 2d 576, 580, cert. den., 356 U. S. 921 (1958), reh. den., 354 U. S. 964 (1958), where, in upholding a successor judge's decision that he could properly proceed, the court stated:

> "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character."

Appellants assert that this case is precisely of such character; that it depends almost in its entirety upon the testimony of Leonard and Nesseth, which was flatly contradicted by the appellants' witnesses in many material respects; that credibility of witnesses was of the essence of the case.

Accepting the statement in Connelly, we do not apprehend that where credibility of government witnesses is a serious issue it must follow ipso facto that a new trial must be had. In Bennett v. United States, 5 Cir., 1960, 285 F. 2d 567, cert. den., 366 U. S. 911 (1961), the court held that the successor judge acted properly in passing upon defendant's new trial motion and in sentencing him

---

court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

even though the facts were in dispute and the resolution of factual dispute by the jury was dependent upon demeanor.

Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence. We should be inclined to emphasize demeanor rather than credibility as the vital factor upon the question here presented. The inquiry then would seem to be as to how importantly demeanor appears to loom in making the necessary credibility determinations.

Here Judge Boldt, before ruling on the supplemental motions for new trial, spent more than three months in a careful study of the record. 7,500 pages of transcript were condensed by him into an abstract of 1,320 pages. He concluded, in his memorandum order:

> "On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed a most exhaustive consideration of the record and analysis of authority are those relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars, was fully and convincingly corroborated."

This conclusion with respect to the substance of the corroborating evidence was reiterated from the bench at the time of imposing sentence. At that time Judge Boldt also expressed his conviction, based upon actions and words of Judge Tolin, that Judge Tolin "had not the slightest doubt of the guilt of any of the defendants or of the credibility of the principal witnesses."

In the exercise of his discretion Judge Boldt has, in our view, concerned himself with the vital question. He has concluded, after most careful and conscientious study, that the corroboration Leonard and Nesseh received from other convincing evidence placed the government's case safely beyond demeanor impeachment and that Judge Tolin himself had not been disturbed by questions of credibility. His determination in this latter respect is reinforced, to some extent at least, by Judge Tolin's charge to the jury. He warned them to discount the effect fear and the courtroom atmosphere might have on witnesses and emphasized the virtue of appraising testimony by the manner in which it successfully integrated with other evidence.

We do not find abuse of discretion in the action of Judge Boldt in proceeding, as successor judge under Rule 25, to the completion of the judicial proceedings in the district court.

DECISION.

As to Appellant Carbo, judgment affirmed.

As to Appellant Palermo, judgment affirmed.

As to Appellant Gibson, judgment affirmed.

As to Appellant Sica, judgment upon Counts 1 and 4 affirmed. Judgment on Count 5 reversed and the case remanded with instructions that judgment on this count be set aside.

As to Appellant Dragna, judgment reversed and the case remanded with instructions that judgment be entered for this defendant.

(Endorsed) Opinion Filed Feb. 13, 1963.

FRANK H. SCHMID,
Clerk.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 17,762.

PAUL JOHN CARBO, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Judgment.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment in this Cause be, and hereby is affirmed as to appellants Carbo, Palermo and Gibson; that judgment as to appellant Sica is affirmed on Counts 1 and 4 and on Count 5 judgment is reversed and the case remanded with instructions that judgment on this count be set aside.

Filed and entered February 13, 1963.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Excerpt from Proceedings of Tuesday, March 19, 1963.

Before: BARNES, HAMLIN and MERRILL, *Circuit Judges.*

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants Sica (filed March 12, 1963), Palermo, Carbo and Gibson, filed March 14, 1963, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

APPENDIX C.

Constitution, Statutes and Regulations Involved.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. * * *"

The Fifth Amendment to the Constitution of the United States provides:

> "* * * nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *"

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *"

Section 301 of the Federal Communications Act of June 19, 1934, C. 652, 48 Stat. 1081 (U. S. C. Title 47, Sec. 301) provides in part as follows:

> "* * * No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications or signals from and/or to places beyond the borders of said State; * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. * * *"

Section 501 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1100 (U. S. C., Title 47, Sec. 501) provides as follows:

> "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

Section 502 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1-64, 1100 (U. S. C., Title 47, Sec. 502) provides as follows:

> "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103 (U. S. C., Title 47, Sec. 605) provides in part as follows:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *."

The Order of the Federal Communications Commission at Docket No. 6787, November 26, 1947, 12 F. C. C. 1005, 1006-1007, provides:

> "It is ordered that the Commission's report of March 24, 1947 [11 F. C. C. 1033-1056] herein, as modified by this order, is made a part hereof by reference;
>
> It is further ordered that the use of recording devices in connection with interstate and foreign message toll telephone service is authorized, subject to the following conditions:
>
> (1) That such use is accompanied by adequate notice to all parties to the telephone conversation that the conversation is being recorded;
>
> (2) That such notice will be given by the use of an automatic tone-warning device, which will

automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use; such signal to have the characteristics specified above;

(3) That such automatic tone-warning device may be furnished or maintained by anyone, whether or not a telephone company, subject to the requirement that such device have the characteristics specified above;

(4) That no recording device shall be used in connection with interstate or foreign message toll telephone service unless, at the will of the user, it can be physically connected to and disconnected from the telephone line or switched on and off;

(5) That in the case of a telephone recorder physically attached to the telephone line, the equipment necessary to make such physical connection as distinguished from the automatic tone-warning device, shall be provided, installed, and maintained by a company or other organization responsible for the furnishing of the telephone service;

It is further ordered that respondent carriers shall rescind and cancel any tariff regulations which any of them now have on file with this Commission which have the effect of barring the use of recording devices in connection with interstate and foreign telephone service under the conditions of such use specified in this order;

It is further ordered that telephone carriers subject to the Communications Act of 1934, as amended, shall, in accordance with the provision of section 203 of the act, file tariff regulations with the Commission which provide for the use of recording devices in connection with interstate and foreign message toll-telephone service under the conditions specified in this

order; and which, in addition, provide for reasonable arrangements for sales demonstrations of telephone recorders by recorder organizations;

It is further ordered that telephone carriers subject to the Communications Act of 1934, as amended, shall undertake an appropriate publicity program designed to inform telephone users generally of the use of telephone recording devices and of the import of the warning signal;

It is further ordered that the above petitions of the Soundscriber Corp., Thomas A. Edison, Inc., and Dictaphone Corp., are denied;

It is further ordered that this order shall take effect on the 15th day of January 1948."

The Order of the Federal Communications Commission at Docket No. 6787, May 20, 1948, 12 F. C. C. 1008-1009, provides:

"It is ordered that the order of November 26, 1947 [12 F. C. C. 1005, 1006-1007], herein, is modified in the following respects:

In the third recital paragraph of said order, the fourth characteristic specified therein shall read:

Frequency of recurrence of each signal * * * not less than 12 seconds and not more than 18 seconds.

In the second decretal paragraph of said order, subparagraphs (3) and (5) thereof are revised to read as follows:

(3) That such automatic tone warning device shall be furnished, installed, and maintained by the company or other organization responsible for the furnishing of the telephone service, subject to the requirements that such device have the characteristics specified above;

(5) That in the case of a telephone recorder physically attached to the telephone line, the equipment necessary to make such connection, including the automatic tone-warning device, shall be provided, installed, and maintained by the company or other organization responsible for the furnishing of the telephone service.

The fourth decretal paragraph of said order is revised to read:

It is further ordered that telephone carriers subject to the Communications Act of 1934, as amended, shall, in accordance with the provision of section 203 of the act, file tariff regulations with the Commission, to become effective on not less than 30 days' notice, but in no event to become effective later than August 2, 1948, and to provide for the use of recording devices in connection with interstate and foreign message toll-telephone service under the conditions specified in this order; and, in addition, to provide for reasonable arrangements for sales demonstrations of telephone recorders by recorder organizations.

It is further ordered that the order of November 26, 1947, as modified herein, shall take effect on the 30th day of June, 1948."

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 17 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 1421

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM B. BEIRNE,
408 South Spring Street,
Los Angeles 13, California,

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

	PAGE
Opinions below	2
Grounds on which the jurisdiction of this court is invoked	2
Questions presented for review	2
Constitutional provisions and statutes involved	4
Statement of the case	4
Reasons for granting the writ and argument amplifying same	7
I. Certiorari should be granted to settle the important question, never before passed upon by this court, as to whether, in a conspiracy prosecution where the evidence discloses declarations of alleged co-conspirators made in the absence of other alleged co-conspirators, the court must instruct the jury that the declarations of an alleged co-conspirator can not be used by the jury for the purpose of establishing the absent defendant's membership in the conspiracy	7
II. Certiorari should be granted because of the importance to the administration of criminal justice in the federal courts of, and because this court has heretofore not passed upon, the question of the appropriate application to be made of Rule 25, Federal Rules of Criminal Procedure in a case where the credibility of the prosecution's chief witnesses is a serious issue and the evidence is in sharp conflict	13

III. PAGE

Certiorari should be granted because the right of petitioner to freedom from unreasonable search and seizure under the Fourth Amendment was abridged by the admission of evidence surreptitiously obtained by the use of electronic devices 16

IV.

This court has never decided, but should, the important question of whether the prosecution may directly charge in the indictment the bad reputation of defendants and introduce, as part of its case in chief, evidence of the reputation of defendants without defendants' having ever put their reputations in issue. Additionally, the reputation charges in the indictment violate petitioner's rights under the Fifth and Sixth Amendments..... 22

V.

Certiorari should be granted because the convictions and sentences resulted from a proceeding which denied petitioner a fair trial, calling for the exercise of this court's power of supervision..... 27

Conclusion 34

INDEX TO APPENDICES

PAGE

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit 1

Appendix B. Judgment 65

Appendix C. Constitutional Provisions and Statutes Involved 67

Appendix D. Requested Instructions re Declarations of Alleged Co-Conspirators Outside the Presence of Defendants 71

TABLE OF AUTHORITIES CITED

CASES	PAGE
Applebaum v. United States, 274 Fed. 43	14
Bartlett v. United States, 166 F. 2d 920	9
Bayou Properties Company v. Gobble, 347 S. W. 2d 314	9
Briggs v. United States, 175 F. 2d 317	10
Chambers v. Florida, 309 U. S. 227	24
Connelly v. United States, 249 F. 2d 576	15
Cramp v. Board of Public Instruction, 368 U. S. 278	24
DeHaven v. Caulfield, 314 F. 2d 268	32
Dennis v. United States, 183 F. 2d 201	9
Direct Sales Co. v. United States, 319 U. S. 713	31
Feswick v. United States, 329 U. S. 211	10
Frank v. Mangum, 237 U. S. 309	24
Galloway v. United States, 319 U. S. 372	31
Glasser v. United States, 315 U. S. 60	8, 9
Guzman v. Pichirilo, 369 U. S. 698	15
Hauger v. United States, 173 Fed. 54	9
Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114	12
Ingram v. United States, 360 U. S. 672	31
Irvin v. Dowd, 366 U. S. 717	24
Killian v. United States, 368 U. S. 231	24
Kotteakos v. United States, 328 U. S. 750	11
Lanzetta v. New Jersey, 306 U. S. 451	24, 26
Logan v. United States, 144 U. S. 263	10
Looney v. Metropolitan Railroad Co., 200 U. S. 480	31
Lopez v. United States, No. 236, Oct. Term, 1962	21

PAGE

Lutwak v. United States, 344 U. S. 604 ..... 10, 11

Manning v. John Hancock Mutual Life Ins. Co., 100 U. S. 693, 25 L. Ed. 761 31

Mapp v. Ohio, 267 U. S. 643 20

Marshall v. United States, 360 U. S. 310 23

McKenzie v. United States, 126 F. 2d 533 33

Michelson v. United States, 335 U. S. 469 23

Montford v. United States, 200 F. 2d 759 ..... 9, 10

Moore v. Chesapeake & Ohio Railway Co., 340 U. S. 573 .. 31

Moore v. Dempsey, 261 U. S. 86 24

Napue v. Illinois, 360 U. S. 264 ..... 29, 30

Nardone v. United States, 308 U. S. 333 17

On Lee v. United States, 343 U. S. 747 21

Paoli v. United States, 352 U. S. 232 10

People v. Talbot, 65 Cal. App. 2d 654 10

Rathbun v. United States, 355 U. S. 107 ..... 17, 19, 20

Rowley v. Braly, 286 S. W. 241 9

Russell v. United States, 369 U. S. 749 ..... 25, 26

Schmeller v. United States, 143 F. 2d 544 9

Schwartz v. Texas, 344 U. S. 199 20

Screws v. United States, 325 U. S. 91 7

Silverman v. United States, 365 U. S. 505 16

Townsend v. Sain, 372 U. S. 293 15

United States v. Fio Rito, 300 F. 2d 424 33

United States v. Flynn, 216 F. 2d 354 10

United States v. Guido, 161 F. 2d 492 12

United States v. Johnson, 327 U. S. 106 14

PAGE

United States v. Massiah, 307 F. 2d 62 7

United States v. McGonigal, 214 Fed. Supp. 621 14

United States v. Rabinowich, 238 U. S. 78 11

United States v. Richards, 149 Fed. 443 10

United States v. Socony-Vacuum Oil Co., 310 U. S. 150 14

United States v. Stephenson, 121 Fed. Supp. 274, app. dism. 223 F. 2d 336 18

Van Molktke v. Gillies, 332 U. S. 708 27

Wong Sun v. United States, 371 U. S. 471 21

Yates v. United States, 354 U. S. 298 11

RULES

Federal Rules of Criminal Procedure, Rule 25 ..... 3, 4, 5, 13, 16

27 Federal Rules Decisions, pp. 105, 125, Mathes, Some Suggested Instructions for Particular Federal Criminal Cases 10

STATUTES

48 Statutes at Large, p. 1103 16

62 Statutes at Large, p. 701 4

62 Statutes at Large, p. 741 4

62 Statutes at Large, p. 793 4

United States Code, Title 18, Sec. 271 4

United States Code, Title 18, Sec. 371 11

United States Code, Title 18, Sec. 875(b) 4

United States Code, Title 18, Sec. 1951 4

United States Code, Title 18, Sec. 3231 4

United States Code, Title 28, Sec. 1254(1) 2

PAGE

United States Code, Title 47, Sec. 605 ..... 16, 20

United States Constitution, Fourth Amendment 4, 21

United States Constitution, Fifth Amendment 3, 4, 26

United States Constitution, Sixth Amendment 3, 4, 26

TEXTBOOKS

22 Corpus Juris Secundum, pp. 1125-1126 10

40 Harvard Law Review, pp. 392, 415, Maguire & Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence 9

72 Harvard Law Review (1959), pp. 920, 987, article, Developments in the Law—Criminal Conspiracy 10

52 Michigan Law Review (1954), pp. 1159, 1176, Levie, Hearsay and Conspiracy—A Re-examination of the Co-Conspirators' Exception to the Hearsay Rule 10

IN THE

Supreme Court of the United States

October Term, 1962

No. .....

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Paul John Carbo, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming judgments of the United States District Court for the Southern District of California sentencing petitioner to 25 years' imprisonment and to pay a fine of $10,000.00 [C. T. 1495].[1]

[1]The record as certified to this Court by the Clerk of the court below consists of 69 volumes. Volumes 1 through 6 is the Clerk's Record, hereinafter referred to as C. T., in the District Court; Volumes 7 through 16 is an Abstract of Testimony [A. T.] made by the successor judge (the trial judge having died subsequent to the verdict of the jury; but before sentence and before passing on motions for new trial); Volumes 17 through 68 is the Reporter's Transcript, herein referred to as R. T., of the trial; Volume 69 is the Clerk's Record in the Court of Appeals, herein referred to as R. C. A.

Opinions Below.

Trial in the District Court was by jury.

The opinion of the court below [R. C. A. Slip Opinion, 314 F. 2d 718] is appended hereto as Appendix "A."[2]

The judgment of the court below is appended hereto as Appendix "B."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is February 13, 1963 [R. C. A. Judgment].

2. Timely filed petition for rehearing was denied on March 19, 1963 [R. C. A. Order]. Mr. Justice Douglas granted an extension of time within which to file petition for writ of certiorari to and including May 18, 1963.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254(1).

Questions Presented for Review.

1. In a conspiracy prosecution, where the evidence discloses declarations of alleged co-conspirators made in the absence of other alleged co-conspirators, should not the jury be instructed that a defendant's membership in the alleged conspiracy must be established by

---

[2]There were opinions by the Court below (288 F. 2d 282; 288 F. 2d 686, cert. den. 365 U. S. 861; 300 F. 2d 889; 302 F. 2d 456) and by Mr. Justice Douglas (7 L. ed. 2d 769, rev. den., 369 U. S. 868) deciding questions of bail during and after trial, but not going to the merits of the case. And there was an opinion by this Court (364 U. S. 611) before trial, on a procedural point.

that defendant's own acts, conduct or declarations, and that the declarations of an alleged co-conspirator made in the absence of that defendant, cannot be used by the jury for the purpose of establishing the absent defendant's membership in the conspiracy?

1a. As a subsidiary question to the one just posed, must not the jury, in such a conspiracy prosecution, be instructed that before it can consider the declarations of an alleged co-conspirator made in the absence of a defendant, against the absent defendant, there must be independent evidence of the existence of the conspiracy, of the membership of the declarant in it and of the connection of the non-present defendant with it?

2. Where the facts are in sharp dispute and the credibility of the witnesses gravely in issue, may a successor judge who has neither seen nor heard the witnesses, properly pass on motions for new trial, or does Rule 25, Federal Rules of Criminal Procedure, require that under these circumstances a new trial be granted?

3. May the prosecution, as a part of its case in chief, charge and introduce evidence as to the alleged reputation of a defendant?

3a. Corollary to this, does an indictment which charges some of the defendants with having "underworld" reputations, offend the requirements of the Fifth and Sixth Amendments?

4. May surreptitiously obtained electronic evidence be admitted into evidence?

5. Did the petitioner receive a fair trial as required by due process of law?

6. Petitioner relies also on the other questions posed by the other petitioners.

Constitutional Provisions and Statutes Involved.

Involved are the Fourth, Fifth and Sixth Amendments to the United States Constitution; 18 U. S. C. 271 (62 Stat. 701); 18 U. S. C. 875(b) (62 Stat. 741); 18 U. S. C. 1951 (62 Stat. 793) and Rule 25, Federal Rules of Criminal Procedure. They are set out hereinafter as Appendix "C."

Statement of the Case.

The trial court had jurisdiction under 18 U. S. C. 3231.

The contention of the prosecution was that all of the defendants (Carbo, Gibson, Palermo, Sica and Dragna)[3] had entered into two conspiracies to extort from Leonard Blakely and Donald Paul Nesseth a portion of the moneys due the manager of Don Jordan, a professional prize-fighter, from the purses earned by Jordan as such prize-fighter, and also to extort from Blakely and Nesseth control of the professional activities of said fighter. It was further contended that these objectives were to be accomplished by threats of physical harm and violence and threats of economic

[3]The court below reversed the conviction of Dragna and ordered his acquittal (Appx. A, 63). Separate petitions for writs of certiorari are being filed in this Court by the other defendants. The facts are here set out in summary form. To avoid duplication they are set out more fully in the petition for writ of certiorari being filed by defendant Sica.

injury to Blakely and Nesseth and by the use of the alleged underworld reputations of two of the defendants, Sica and Dragna [C. T. 2-3, 9-10].

The counts in the Indictment charging the substantive offenses of extortion [C. T. 6, 7], attempted extortion [C. T. 8] and interstate telephone threats [C. T. 12-16] all arose out of or are connected with the counts charging the conspiracies above-mentioned.

The substance of the prosecution's case is based mainly upon the testimony of the witness Leonard Blakely, or, as he is designated in the testimony, Jackie Leonard, and upon the testimony of the witness, Donald Paul Nesseth.

The evidence in the case is in sharp conflict and the credibility of the prosecution witnesses seriously in issue.[4]

The jury found all the defendants guilty on all the counts charged [C. T. 951-960].

Following the verdicts, motions for new trials were filed [C. T. 962, 965, 968, 978]. Prior to the time set for the hearings on those motions, and on June 11, 1961, the trial judge, the Hon. Ernest A. Tolin, passed away. On June 26, 1961, the Hon. George H. Boldt, as his sucessor, was designated pursuant to Rule 25, Federal Rules of Criminal Procedure [C. T. 1064].

---

[4]This fact is the more significant in relation to the Rule 25 point discussed below, page 13. (See also Question 2 of Questions Presented, *supra*, at p. 3.)

Subsequent to Judge Boldt's appointment as successor judge, Supplemental Motions for New Trial were filed [C. T. 988, 998, 1054]. These motions were based upon the ground that Judge Boldt could not properly nor satisfactorily perform the duties devolving upon him in this case by reason of his appointment as successor judge, and, particularly, the duty of passing upon the motions for a new trial made by the respective defendants, which duty involved passing upon the issue of the credibility of the witnesses and also the issue of the conflict in the evidence [C. T. 989-994, 999-1004, 1055-1060].

All motions were denied [C. T. 1342, 1491].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Certiorari Should Be Granted to Settle the Important Question, Never Before Passed Upon by This Court, as to Whether, in a Conspiracy Prosecution Where the Evidence Discloses Declarations of Alleged Co-Conspirators Made in the Absence of Other Alleged Co-Conspirators, the Court Must Instruct the Jury That the Declarations of an Alleged Co-Conspirator Can Not Be Used by the Jury for the Purpose of Establishing the Absent Defendant's Membership in the Conspiracy.

The backbone of the prosecution's case consisted of statements purportedly made by each of the alleged co-conspirators outside the presence of the other alleged co-conspirators.

Petitioner requested in a number of ways[5] that the trial court instruct the jury it could not use the out-of-presence statements of an alleged co-conspirator against a non-present defendant to establish membership in the conspiracy of the absent defendant. These instructions were refused [R. T. 7719] and their im-

---

[5]The requested instructions are set out hereinafter in Appendix "D." The matter goes to the very heart of the elements of the crime which the prosecution must prove, so that, even had petitioner not requested the instructions, or if his requests were erroneously phrased, the trial court would have been obligated to instruct on its own and the failure so to do would have been reversible error. (*Screws v. United States*, 325 U. S. 91, 106-107; *United States v. Massiah*, 307 F. 2d 62, 71 (C. A. 2, 1962), and cases cited.)

port was not covered by any instructions the court did give [R. T. 7651-7657, 7714-7719]. Petitioner also requested (see Appx. D) instructions that the jury could not use the declarations against the absent defendant, unless it was satisfied by evidence other than those statements, *i. e.*, by evidence aliunde as the cases put it; that there was a "conspiracy,"[6] that the declarant was a member of that conspiracy and that the non-present defendant was a member of it. These instructions were likewise refused [R. T. 7719] and also not otherwise covered [R. T. 7651-7657, 7714-7719]. The Court below ruled (Appx. A, 30) that petitioner's requested instructions did not represent the law; that the independent evidence rule was only one of admissibility. In effect, this was a ruling that once the trial judge determined there was sufficient independent evidence to admit the hearsay statement, then the flood gates are opened and the jury can use the out-of-presence declarations to determine if the non-present defendant was a member of the conspiracy. Accordingly, the court below has sanctioned a rule which, indeed, permits "hearsay (to) lift itself up by its own bootstraps." (*Glasser v. United States*, 315 U. S. 60, 75).

The very discussion of the problem by the court below demonstrates its importance and the necessity for this Court to consider the question. Thus, the court concedes (Appx. A, 30) that "the situation is . . . confusing," and that the instructions urged by petitioners have been held proper by "many cases" (Appx. A, 35). And it acknowledges (Appx. A, 35) a conflict between it and the Sixth Circuit. Moreover, the court

[6] See discussion, *infra*, as to the use of this word.

does not suggest that any case decided by this Court has determined the question; and none of the three authorities cited by the appellate court as "persuasive" (Appx. A, 32) is a case adjudicated by this Court. Petitioners believe that the rule announced by the court below is contrary to the rationale of *Glasser*, *supra*, and the other rulings of this Court mentioned hereinafter; and is in conflict with the decisions we cite from other Circuits. But at minimum, the question has not been decided. It is eminently one for decision here.

In reaching its conclusion, the court below relied (Appx. A, 31-32) upon statements made by way of dictum in *Dennis v. United States*, 183 F. 2d 201, 230-231 (CA 2 1950) and in the civil case of *Rowley v. Braly*, 286 S. W. 241, 245 (Tex. *Civil* Appeals, 1926)[7] and on a statement in a footnote in Maguire & Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence, 40 Harvard Law Review, 392, 415.

We submit that the rule enunciated by the court below is contrary to, and in conflict with, the other authorities in the field (*Schmeller v. United States*, 143 F. 2d 544, 551 [CA 6 1944]; *Bartlett v. United States*, 166 F. 2d 920, 924 [CCA 10, 1948]; *Hauger v. United States*, 173 Fed. 54, 57 [CCA 4 1909]; *Montford v.*

[7] In *Dennis*, the discussion relied upon by the court below was not directed to the point being urged here. Moreover, after stating as it did, the court in *Dennis* said (183 F. 2d at 231): "Be that as it may, we need not decide the point. . . ." In *Rowley*, the court instructed the jury not to consider the statement "for any purpose," not even against the declarant who was charged as one of the conspirators. In a later case, on another point, the *Rowley* case was held to "not represent the law." (*Bayou Properties Company v. Gobble*, 347 S. W. 2d 314, 315 (Tex. Civ. App. 1961).)

United States, 200 F. 2d 759, 760 [CA 5 1952], Mathes, "Some Suggested Instructions for Particular Federal Criminal Cases," 27 F. R. D. 105, 125; *United States v. Richards*, 149 Fed. 443, 452 [D. Neb. 1906]; *Briggs v. United States*, 175 F. 2d 317, 320 [CA 10 1949], cert. den. 338 U. S. 861; *United States v. Flynn*, 216 F. 2d 354, 362 [CA 2 1954]; *People v. Talbot*, 65 Cal. App. 2d 654, 663; Developments in the Law—Criminal Conspiracy, 72 Harvard Law Review 920, 987 [1959]; Levie, "Hearsay and Conspiracy—A Re-examination of the Co-Conspirators' Exception to the Hearsay Rule," 52 Mighican Law Review, 1159, 1176 [1954]; 22 C. J. S. 1125-26).

The reasoning of the Court below for the adoption of its rule is (1) that instructions such as requested by petitioner would require the jury to "compartmentalize the evidence" and that this is an impossibility (Appx. A, 33) and, (2) there is no occasion to resort to the declaration if the jury must first find from other evidence that the non-present defendant is a member of the conspiracy (Appx. A, 31). Neither ground we respectfully submit, is valid.

As to the first, the jury is constantly being required to "compartmentalize." A striking example is the very rule in conspiracy cases that requires an instruction be given the jury that an out-of-presence declaration by an alleged co-conspirator after the conspiracy has ended, can be considered only against the declarant and not against the absent defendants (*Paoli v. United States*, 352 U. S. 232, 237; *Fesvick v. United States*, 329 U. S. 211, 217; *Logan v. United States*, 144 U. S. 263, 308-309; *Lutwak v. United States*, 344 U. S. 604,

618-619). And see *Lutwak, supra,* and *Kotteakos v. United States,* 328 U. S. 750, 776-777 for the teaching that precisely in a conspiracy case must the instructions be careful and precise to "safeguard each defendant, individually. . . . from loss of identity in the mass" and that "the jury (must be) instructed as to such declarations and the limitations put upon them."[8]

Nor is there any more validity in the reasoning of the court below in connection with the principle suggested in the second ground which it advances. The Circuit Court reasoned (Appx. A, 31) that petitioner's contention is: "You may not consider this evidence unless you first find the defendant guilty." This is not petitioner's contention. Petitioner does not contend that the jury may not consider the out-of-presence declaration in determining the ultimate question of guilt or innocence. He does contend that in deciding whether the absent defendant is a member of the "conspiracy," the jury may not use the declaration for that purpose. The mere fact that, by other evidence, a defendant is found to be a member of the "conspiracy" does not make him guilty of a crime. There must be some action taken in furtherance of the conspiracy or there is no crime—the defendant is not "guilty." (18 U. S. C. 371; *Yates v. United States,* 354 U. S. 298, 344; *United States v. Rabinowich,* 238 U. S. 78, 86;

[8] *Cf.* the approval by the court below in this very case (Appx. A, 44) of the "limited consideration which might be given" to the reputation testimony which was admitted into evidence.

Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114, 1123). The Circuit Court's difficulty, it seems to us, is that it failed to distinguish the two meanings given to the word "conspiracy": one, as the agreement between the parties (which is not, in and of itself, a crime); and the other, as the agreement plus an act in furtherance of, or to effectuate the object of, the agreement, which is a crime. That is, a mere agreement with no effort to effectuate it, does not constitute the crime of conspiracy *(ibid)*. Thus viewed, the declaration by an alleged co-conspirator in the absence of a defendant—once the absent defendant has been shown to be a member of the "conspiracy"—may serve the prosecution a very useful purpose, without which it may have no case at all.[9] In other words, the co-conspirator exception to the hearsay rule permits the prosecution to show a declaration of an alleged co-conspirator made *in furtherance of the "conspiracy" (United States v. Guido*, 161 F. 2d 492, 495 [CA 3 1947]). An absent defendant, shown by other evidence to be a party to the "conspiracy," *i.e.*, to the agreement, is bound by that declaration, but such declaration itself—the co-conspirator declaration—cannot be used to show that the absent defendant is a party to the agreement.

The question merits this Court's review.

---

[9]In this connection, it is not without significance that one of the overt acts alleged by the prosecution is that [C. T. 5] "(o)n or about May 14, 1959, co-conspirator William Daly had a conversation with Leonard Blakely."

II.

Certiorari Should Be Granted Because of the Importance to the Administration of Criminal Justice in the Federal Courts of, and Because This Court Has Heretofore Not Passed Upon, the Question of the Appropriate Application to Be Made of Rule 25, Federal Rules of Criminal Procedure in a Case Where the Credibility of the Prosecution's Chief Witnesses Is a Serious Issue and the Evidence Is in Sharp Conflict.

This Court has never passed upon, either by way of interpretation or application, a case involving Rule 25, Federal Rules of Criminal Procedure. The question is of obvious and recurring importance. This Court and Congress recognized this in the very promulgation of the Rule itself.

The reasoning of the court below in disposing of the Rule 25 Point, fairly emasculates, we respectfully submit, the Rule and denied to petitioners their right to a proper consideration of their motions for new trial.

No contention is made by respondent that the evidence is not in sharp conflict, nor that the credibility of the prosecution's chief witnesses is not a serious issue. The court below recognizes (Appx. A, 7) the "vigorous" denial of the testimony of the prosecution's chief witness, Leonard; it acknowledges (Appx. A, 57) that "Leonard was caught up in a falsehood with reference to his alleged solicitation of hush money from appellants"; and that "government counsel in argument to the jury conceded that Leonard was not testifying truthfully in this regard." In its capacity as an appellate review court, in passing on the sufficiency of the

evidence in the face of the "attack on the credibility of Leonard," the court below ruled that it would "not disturb the jury's determination in this respect" (Appx. A, 25) but it failed to recognize that the function of a trial judge in passing on a motion for new trial is quite different from that of a court on appeal. In so doing it denied to petitioner a fundamental right to which he is entitled.

On a motion for new trial, the trial judge does indeed "weigh the evidence" (*United States v. McGonigal*, 214 F. Supp. 621, 622 (D Del. 1963) and sits "as the thirteenth juror" (*Applebaum v. United States*, 274 Fed. 43, 46 (CCA 7 1921). We submit that in a case such as this, where the credibility of the prosecution's chief witnesses is of crucial importance, this "weighing" process simply cannot be done by a judge who was not present at the trial and who did not see the witnesses nor hear the testimony. *Cf.* this Court in *United States v. Johnson*, 327 U. S. 106, 112, commenting on the fact that the trial judge, who "conducted the original trial and had watched the case . . . unfold from day to day . . . was exceptionally qualified to pass on the" motion for new trial questions. It is for this reason that a trial court's decision on a motion for new trial based on questions of fact is not normally subject to review. (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247, 248; *United States v. Johnson*, 327 U. S. 106, 111, *supra*). But the basis for this rule is the trial judge's expertise precisely because he had the opportunity of watching the case "unfold from day to day." This expertise was denied petitioner.

The court below said (Appx. A, 61-62) that the successor judge did not abuse his discretion in passing on the motions for new trial because he "spent more than three months in a careful study of the record" and "expressed his conviction . . . that (the trial judge) 'had not the slightest doubt of the guilt of any of the defendants[10], or of the credibility of the principal witnesses.'" With due respect, we suggest that the successor judge's excursion into the mind of the trial judge was an impossibility; and was just as hopeless as his trying to ascertain the credibility of the witnesses whom he never saw nor heard, regardless of the amount of time—be it three months or be it three years—spent reading a cold record. At minimum, the decision of the Court of Appeals is in conflict with the dictum of the Eighth Circuit in *Connelly v. United States*, 249 F. 2d 576, 580 (1957),[11] a conflict which this Court should resolve.

We need not labor the point as to the importance of demeanor in adjudging credibility and thus in arriving at the truth. This Court has recognized this in the past *(Guzman v. Pichirilo*, 369 U. S. 698). And only this Term has reiterated it *(Townsend v. Sain*, 372 U. S. 293, 322): "Where an unresolved factual dispute exists, demeanor evidence is a significant fac-

---

[10] *Cf.* the Court below's reversal as to defendant Dragna (Appx. A, 25-26).

[11] "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. . . ."

tor in adjudging credibility. And questions of credibility, of course, are basic to resolutions of conflicts in testimony."

Rule 25 is a salutary rule designed to cover an ever recurring problem. A motion for new trial is a right which should not be denied a defendant by a failure to apply the Rule in its true sense. Hearing should be granted by this Court to give guidance to the trial courts in this important matter.

III.

Certiorari Should Be Granted Because the Right of Petitioner to Freedom From Unreasonable Search and Seizure Under the Fourth Amendment Was Abridged by the Admission of Evidence Surreptitiously Obtained by the Use of Electronic Devices.

a.

Exhibit 177 is a recording of a telephone conversation between Leonard and defendant Palermo on May 5, 1959 [R. T. 6708, 6710, 7547-7554]. It was obtained by means of an induction coil specially placed on Leonard's telephone, with Leonard's consent, specifically to intercept this very conversation, but without the knowledge or consent of Palermo [R. T. 6711].

We contend that this type of telephone message interception and divulgence thereof, violated both the Fourth Amendment guarantee against unreasonable search and a seizure and also §605 of the Federal Communications Act (47 U. S. C. 605; 48 Stat. 1103). The recording was therefore inadmissible in evidence (*Silverman v. United States*, 365 U. S. 505 and *Nar-*

donne v. United States, 308 U. S. 333). This question has never been passed upon by this Court.

The court below held (Appx. A, 37) that the exhibit was not illegally obtained; that *Rathbun v. United States,* 355 U. S. 107, was dispositive. We respectfully disagree.

In *Rathbun,* stating the question to be decided, this Court said (355 U. S. at 107):

> "This case concerns the issue of whether the contents of a communication overheard on a *regularly used* telephone extension with the consent of one party to the conversation are admissible in federal court. . . ." (Emphasis added.)

There is a vast difference between a regularly installed telephone extension and an induction coil especially placed for the purpose of hearing a particular conversation.

The Government in its brief before this Court in *Rathbun* recognized the distinction and pointedly made it in support of its argument. Thus in its brief, the Solicitor General argued:

Page 12:

> "The legislative history shows that Congress intended to safeguard the privacy of means of communication by forbidding the *surreptitious interjection of an independent device* for the purpose of interception by a listener or a recorder, not to protect the message from disclosure by the receiver." (Emphasis added).

To show that an extension phone is not a "surreptitious interjection of an independent device for the pur-

pose of interception by a listener or a recorder," the Government further said in its brief (page 17, f.n. 9):

> "The use of the term 'extension' may be misleading. In general use, all telephone instruments installed in a home are on a parity; no one is the principal receiver and the others subsidiary. In this case, it appears to have been a matter of chance, or convenience, which instrument Mr. Sparks used. Thus, the use of the word 'extension' really means another *regularly installed* telephone instrument." (Emphasis added).

And demonstrating the difference between a regularly installed and used extension phone, and the device used in the case at bar, the Solicitor General called the following to the attention of the Court (pp. 16-17, f.n. 8):

> "Orders of the Federal Communications Commission dated November 26, 1947, and May 20, 1948, applying to interstate and foreign calls, require telephone common carriers to post tariff schedules for the permanent attachment of mechanical recorders and transcribers to subscriber telephones. . . . (T)here are three general types of recording devices which may be used with a telephone circuit. The first relies upon a direct physical connection to the telephone circuit. This system is subject to detailed regulation as mentioned above.[12] The second is the inductive type which relies upon the use of an *in-*

[12] *Cf. United States v. Stephenson*, 121 Fed. Supp. 274 (D. C. D. C. 1954), app. dism. 223 F. 2d 336 (C. A. D. C. 1955), holding inadmissible a recording made from this type of an installation without the "beep."

duction coil placed in proximity to the telephone lines. The Commission regards its use as prohibited by the Commission's orders. The third is the accoustic type which amplifies and records the telephone message as it is reproduced at the handset. The Commission expressly has not attempted to regulate the use of this type. (Citation)." (Emphasis and footnote added).

As distinguished from an induction coil placed on a telephone for the *specific* purpose of overhearing a *particular* conversation, this Court pointed out in *Rathbun* (355 U. S. at 111):

> "Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one *ordinarily used* instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. . . ." (Emphasis added).

Contrary to the situation thus spoken of by the Court, a party to a telephone conversation does not take the risk that the party on the other end will have a device attached by Governmental investigative agencies to the telephone which, without his knowledge or consent, records the conversation. In contrast to the use of an extension phone and the listening thereon, the use of the induction coil device without the consent of the party, has all the vice of an actual wire-tap and falls within the conduct Congress sought to ban by

§605; it is another variant of official intrusion into privacy. The whole tenor of this Court's opinion in *Rathbun* makes clear that it was only because the hearing by the third party was on a *regularly* installed extension phone, not a device installed *on* the phone *for the purpose* of hearing *that* conversation, that it held there was no interception and therefore no violation of §605.

Thus, this Court said (355 U. S. at 108):

> ". . . This extension had not been installed there just for *this* purpose (to overhear this particular conversation) but was a *regular* connection, previously placed and *normally* used. . . ." (Emphasis added.)

Accordingly, *Rathbun* did not decide, but clearly left for another day—this day, we urge—determination of the law applicable to the factual situation of the instant case. This is likewise true of *Schwartz v. Texas,* 344 U. S. 199. That case, which, by reason of *Mapp v. Ohio,* 267 U. S. 643, may very well no longer be authority for what it held—that evidence obtained in violation of §605 of the Communications Act is admissible in the state courts—left undecided the question as to whether induction coil listening, as in the case at bar, amounts to interception and if so, whether the sender had authorized it. "These questions," said this Court (344 U. S. at 203-204) "can only arise in a federal court proceeding."

This is that proceeding. Hearing should be granted because of the importance of the question and the widespread use of the practice.

b.

Exhibits 100, 101, 102 and 176 are tapes or wires of a conversation between Leonard and unindicted alleged co-conspirator, Daly, in the latter's room at the Ambassador Hotel outside the presence of any of the defendants [C. T. 1357-1413]. They were obtained either by way of a Minifon (a miniature wire recorder) [R. T. 755], or a Fargo device (a concealed radio transmitter [R. T. 2340, 6702]. Petitioner contends the admission of those tapes violated his Fourth Amendment rights.

The importance of the question as to whether this kind of evidence may be admitted and this Court's concern in the now generally prevailing practice of obtaining evidence in this surreptitious electronic manner is demonstrated by the Court's grant of certiorari in *Lopez v. United States*, No. 236, Oct. Term, 1962, now awaiting decision. It can be expected that the decision by the Court in that case will have a bearing on the instant case. Accordingly, we withhold extended comment on the matter to await the Court's decision there.

We note, however,[13] that the petitioner in *Lopez* did not ask this Court to reconsider *On Lee v. United States*, 343 U. S. 747. Petitioner here asks this Court to do just that. This Court has recently made clear that the Fourth Amendment is not limited to physical, tangible materials. In *Wong Sun v. United States*, 371 U. S. 471, 485, it said "that the Fourth Amendment may protect against the overhearing of verbal statments as well as against the more traditional sei-

[13]Brief for the United States in *Lopez*, page 33.

zure of 'papers and effects.'" Hence it protects against invasions by sophisticated, pervasive, modern electronic devices, as well as against the cruder, more violent, methods of the past.

IV.

This Court Has Never Decided, but Should, the Important Question of Whether the Prosecution May Directly Charge in the Indictment the Bad Reputation of Defendants and Introduce, as Part of Its Case in Chief, Evidence of the Reputation of Defendants Without Defendants' Having Ever Put Their Reputations in Issue. Additionally, the Reputation Charges in the Indictment Violate Petitioner's Rights Under the Fifth and Sixth Amendments.

The indictment charged [C. T. 2, 10] that it was a part of the alleged conspiracies to enlist the services of two of the defendants, Sica and Dragna, "known to the said victims to have underworld reputations." And at the trial Leonard was permitted, over objection, to testify that "by reputation I have always known of Joe Sica as an underworld man and a strong arm man," [R. T. 722] and that "(a)lthough I didn't know Mr. Dragna, by reputation I have always heard he was connected with the underworld." [R. T. 734]. Likewise, Nesseth, over objection, was permitted to say, "I knew Sica by reputation only as being an underworld figure" [R. T. 1865] and as to Dragna, "(t)he same" [R. T. 1865], (as to his reputation) "Yes, that he was an underworld figure, in my opinion." [R. T. 1866].

It would appear that what was done here is contrary to all the teachings as to the use of reputation evi-

dence by the prosecution in a criminal case *(Michelson v. United States,* 335 U. S. 469, 475-6).[14] The portent of the doctrine urged by the Government is startling and ominous.

The court below sanctioned the use of Leonard's and Nesseth's testimony as to Sica's and Dragna's alleged reputations on the ground that these defendants[15] "stood in the position of a dangerous weapon to be used to strike fear into the hearts of Leonard and Nesseth" (Appx. A. 41). The analogy, we submit, is not apt.

A gun is an object—a specific object. It can be described; it has shape; it has dimension; it can be shown to and examined by the jury. An alleged underworld reputation is quite different; it is amorphous, of undefined contour, structureless. Moreover, in contrast to a gun, against which a defendant may defend factually that he did not use it,[16] an allegation as to bad reputation as an essential charge in the indictment[17] and presentation of alleged evidence concerning it, are calculated to evoke sentiment, emotion

---

[14]"The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." See also, *Marshall v. United States,* 360 U. S. 310.

[15]The court discussed the matter (Appx. A. 39-45) as though only Sica's alleged reputation had been testified to. But as seen, both Sica's and Dragna's alleged bad reputations were charged and testified about and used against petitioner.

[16]There is no evidence in the record that any of the defendants—certainly not Carbo—knew of the alleged underworld reputations of Sica or Dragna.

[17]The prosecution said that the reputation allegations constituted "an essential portion of the indictment" [C. T. 59].

and prejudice. The effect of the admission of this type of evidence is such as to overwhelm the mind of the jury and is so prejudicial as to leave the defendant with no defense.[18]

The formless character of Subparagraphs (c) of Counts 1 and 5 of the Indictment [C. T. 3, 10][19] is demonstrated by this Court's decision in *Lanzetta v. New Jersey*, 306 U. S. 451, holding a statute making it a crime to be a "gangster" to be "so vague, indefinite and uncertain that it must be condemned, as repugnant to the due process clause of the Fourteenth Amendment." (306 U. S. at 458). See also, *Cramp v. Board of Public Instruction*, 368 U. S. 278, 286-7.

At least, the statute in *Lanzetta* attempted to define the word "gangster."[20] No such, nor any, attempt at definition of the word "underworld" was made here. There is none in the indictment. No instruction was given to the jury (*Cf. Killian v. United States*, 368 U. S. 231, 258). Indeed, the prosecution carefully

---

[18]This Court has, on a number of occasions, reversed convictions where, even though the proceedings appeared on their face to be regular, in actuality they were unfair or presented situations in which it was doubtful that the defendant could really defend himself. For example: *Irvin v. Dowd*, 366 U. S. 717, 728; *Chambers v. Florida*, 309 U. S. 227, 241; *Moore v. Dempsey*, 261 U. S. 86, 91; *cf.* similar views expressed by Mr. Justice Holmes, then in dissent, in *Frank v. Mangum*, 237 U. S. 309, 347.

[19]"It was further a part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands."

[20]Although it made no attempt to define the word "gang."

eschewed offering a definition during the trial.[21] On the contrary, the prosecution required one of the defendants, Gibson, to define the word. The prosecution, under an instruction from the court that the testimony "may be received only as to the defendant Gibson" [R. T. 5035], asked Gibson on cross-examination what he, Gibson, meant by the word "underworld" when Gibson had answered a question put to him containing that word when he was a witness at a previous proceeding after the alleged conspiracies charged in this case were over [R. T. 5037-5050]. Nothing that Gibson might have said in any proceeding at any time or at any place with reference to his interpretation of the word "underworld," could have remedied the Grand Jury's defective allegation in the Indictment which failed to interpret or give meaning to that term. To permit Gibson's definition to supply "what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure." *(Russell v. United States*, 369 U. S. 749, 770).

Even in the context of the Gibson cross-examination, the court said (quoting from the dictionary that

---

[21] R. T. 5039:

"Mr. Goldstein (the prosecutor): Well, I certainly don't intend to tell Mr. Gibson what the word 'underworld' means. It is what Mr. Gibson thinks the word 'underworld' means that is relevant. I have some very clear views on what 'underworld' means, but I think it might be error for me to state those views in the presence of the jury."

the word means "a place of departed spirits" [R. T. 5041] and "the side of the globe opposite to one" [R. T. 5042]), "it . . . is subject to various definitions," [R. T. 5035], "(t)here have been different meanings to the term given at different times," [R. T. 5043] and "(i)t's a term that is susceptible to many modifications and the like." [R. T. 5044]. All this was in the presence of the jury.

If the statute passed upon in *Lanzetta* is so vague, indefinite and uncertain as to violate due process, then the underworld reputation charge in the indictment here is subject to the same vice, for it fails to apprise the defendant "of what he must be prepared to meet." *(Russell v. United States*, 369 U. S. 749, 764). A conviction obtained under such an indictment cannot, under the Fifth and Sixth Amendments, be permitted to stand *(ibid*, 369 U. S. at 760).

It cannot be gainsaid that the question is novel. The prosecution so conceded in the trial court and acknowledged that "(t)he precise point before this Court appears to be one of first impression." [C. T. 360]. Nor can it be argued that the question is not an important one.

We respectfully urge it to be self-evident that certiorari should be granted on this point.

V.

Certiorari Should Be Granted Because the Convictions and Sentences Resulted From a Proceeding Which Denied Petitioner a Fair Trial, Calling for the Exercise of This Court's Power of Supervision.

For example:

1. Nesseth and McCoy, not alleged to be co-conspirators, were permitted, over objection [R. T. 1764], to testify as to what Leonard, also not alleged to be a co-conspirator, told Nesseth, outside the presence of any defendant, as to what Gibson [*e.g.* R. T. 1783], Palermo [*e.g.* R. T. 1798] and Carbo [*e.g.* R. T. 1824] allegedly told Leonard. This was straight out-and-out hearsay. The co-conspirator exception to the hearsay rule stretches the rules of evidence far enough; even its use, under any theory, is carefully circumscribed. There was no need, and it was clearly prejudicial, to add to "the too easy abuses to which the charge of conspiracy may be put." (*Van Molkte v. Gillies*, 332 U. S. 708, 727, Mr. Justice Frankfurter, concurring.)

The court below approved the reception of the evidence on the theory (Appx. A, 51) that the testimony of Nesseth and McCoy was relevant proof of the state of mind of Leonard. The difficulty with the court's reasoning is that the evidence was not offered by the prosecution on the theory of the state of mind of Leonard and so, of course, no instruction was given so limiting the jury's use of the evidence. The prosecution offered the testimony as *substantive* evidence of what Gibson, Palermo and Carbo are supposed to have told

Leonard [R. T. 1765; C. T. 1459, 1460]. The unlimited reception of the evidence was most unfair.

2. The trial court permitted Leonard, over objection [R. T. 1660], to testify that he had received threatening telephone calls from persons never identified, and not connected up with any defendant, during the period May 20, and November 1, 1959 *(ibid)* and that he had been frightened by them [R. T. 1663], the clear implication being that defendants had made the calls, although Government counsel told the court, but *not the jury*, that he did not claim any of the alleged threatening conversations were with any of the defendants [R. T. 1661].

The court below sustained this type of testimony on the theory (Appx. A, 48) that it was a proper method of rehabilitating a witness. The court said *(ibid)* that on cross-examination of Leonard the defendants "had attempted to impeach Leonard's credibility by showing that he had through his wife corruptly expressed a willingness to suppress his testimony and depart the country if he were paid $25.000.00."[22] and that on redirect the Government sought to show that this was founded not on corruption but on fear. But this theory does not bear scrutiny.

It was not on cross-examination that the question of Leonard's receiving money from Palermo was brought up; nor whether Leonard authorized anyone, including his wife, to contact Palermo. These matters were brought up by the prosecution on the direct examination of Leonard. To the questions as to whether

[22]That Leonard tried to do just that cannot be gainsaid as the court below itself held [Appx. A, 57; Ex. E].

he had ever authorized any one, including his wife, to contact Palermo; Leonard answered "No.", [R. T. 766]. This was an out-and-out falsehood as later brought out on cross-examination [R. T. 1653, 1655; Ex. E]. Thus the testimoney of Leonard on re-direct that he had received threatening phone calls and was frightened by them [R. T. 1663] was utterly irrelevant for the purpose of rehabilitating him from the falsehood, that he had not authorized his wife to contact Palermo [R. T. 766]. And as to the very question, this was brought up by the prosecution, not by the defendants [R. T. 766].

The admission of the evidence was highly improper and prejudicial.

3. The manner in which the false Leonard testimony was treated by Government counsel did not comport with the standards required of a prosecutor by the demands of due process, and by *Napue v. Illinois*, 360 U. S. 264.

It will be remembered that it was the prosecution which brought up the question as to whether Leonard had received any money from Palermo and as to whether Leonard had authorized anyone, including his wife, to contact Palermo since May 20, 1959 [R. T. 755-6]. On direct examination Leonard testified, as previously noted, that he had not authorized his wife to contact Palermo [R. T. 766]. But on cross-examination, after the playing of the recording [Ex. E] and

Leonard's admission that he was willing to accept $25,000.00 from Palermo [R. T. 1265], the falsity of his testimony became evident.[23]

Nonetheless, the prosecutor represented to the jury that nothing offered by the defense had impeached Leonard [R. T. 6827], that Leonard was not a perjurer [R. T. 7529], that he was basically honest [R. T. 6943] and not motivated by greed or profit [R. T. 6902].

Before the successor judge on the motion for new trial, the prosecutor made similar assertions. Although that judge, sitting in the place of the trial judge, had the duty of weighing the evidence and adjudging the credibility of the witnesses (a duty which, as we contend [*supra*, Point II], he was unable to perform properly), the prosecutor represented unequivocally [R. T. 7950]: "'. . . Leonard was *completely* truthful.'" (Italics added).

Accordingly, the prosecutor has effectively allowed "false testimony to go uncorrected" (*Napue v. Illinois*, 360 U. S. at 269).

4. The Leonard testimony of anonymous telephone calls was not the only instance of such evidence being received. Chargin was allowed to testify that on June 4, 1959, he received a call from someone, with no attempt even to identify him, warning him to stay out

---

[23]We suggest that, from the following remark of the prosecutor to the jury, in the course of final arguments, the inference is inescapable that the falsity was manifest to him:

"There would seem to be no question that they (Leonard and Mrs. Leonard) had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. 'I don't think there is any doubt of that' [R. T. 7055].

of Hollywood, that he knew what had happened to Jack Leonard [R. T. 2237-2239]. The unfairness of allowing this sort of evidence is manifest. The court below approved of its use (Appx. A, 47-48) on the theory that there was sufficient evidence[24] to warrant the jury's finding that the call had been made by or at the direction of one of the conspirators and therefore binding on all. This is piling inference upon inference: first that Leonard had received a beating (as to which there is no evidence [see f.n. 24, *supra*]), second that the alleged co-conspirators or one of them had administered, or caused to be administered, the beating (*ibid.*), third that the language of the telephone call ("You saw what happened to Jack Leonard" [R. T. 2239]) referred to a beating of Leonard by the alleged conspirators, and, fourth, that the telephone call had been made by one of the alleged co-conspirators. Such speculative inference piling is not permitted. (*Ingram v. United States*, 360 U. S. 672, 680; *Direct Sales Co. v. United States*, 319 U. S. 713, 711; see also *Galloway v. United States*, 319 U. S. 372, 395; *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 578; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 488; *Manning v. John Hancock Mutual Life Ins. Co.*, 100 U. S. 693, 25 L. Ed. 761, 763.)

---

[24]The court below said (Appx. A 18]: "Leonard had received a beating and had been hospitalized."

The basis for this statement by the court, presumably, was the assertion to that effect in the Government's brief below, page 232. But neither of the references cited [R. T. 2882, 6358] is evidence to support the statement that Leonard had received a beating, nor, if he had, that any of the alleged co-conspirators was responsible for it.

5. Although the trial court had instructed counsel that they were not to interrupt another attorney's argument to the jury even if they thought the attorney was "misquoting the evidence" [R. T. 6816], the trial court not only did just that when Carbo's counsel was arguing, but it implied, without saying so expressly, and doubtless without intending, that a defendant's testimony upon which petitioner's counsel was properly relying [R. T. 6209], was not to be believed.

The following colloquy occurred:

R. T. 7283:

"Mr. Beirne: (Carbo) lived in Miami, Florida, and, made his home there for ten years. . . .

The Court: Mr. Beirne, what evidence is there in the record that he lived in Miami, Florida and made his home there for ten years?

Mr. Beirne: Mr. Palermo testified to that."

R. T. 7284:

"The Court: You are drawing on the testimony of Palermo?"

Thus, the court implied that Palermo's testimony was not to be believed.

This is a further example of the unfair treatment petitioner received. (*Cf., DeHaven v. Caulfield,* 314 F. 2d 268 [CA DC 1963]).

6. The instructions given by the court [R. T. 7634-7739] were such as to unduly impress the jury with a duty to convict or to find the defendants guilty. Nowhere in the instructions was the jury charged as to its duty to acquit or to find the defendants not

guilty. Indeed, an examination of the instructions shows that these words were carefully eschewed. A failure to instruct as to the duty acquit, in and of itself, has been held to be reversible error (*McKenzie v. United States*, 126 F. 2d 533, 537 [CA DC 1942]).

Moreover, the instructions advised the jury of the possibility of appeal and of correction if the trial court had made an error [R. T. 7635]. This type of instruction has likewise been held to be reversible error (*United States v. Fio Rito*, 300 F. 2d 424 [CA 7 1963]). And so, again, the unfairness to petitioner is manifest.

7. While Leonard was testifying, the trial court, first, on the theory that a witness, Stanley, who had previously testified, was "alleged to be one of the conspirators" [R. T. 6363], which he was not, and then under the misapprehension that Leonard was testifying as to a conversation he had had with Daly [R. T. 6366] (when, as a matter of fact, the purported conversation was with Stanley), all outside the presence of any defendant, the trial court permitted Leonard to testify as to what Stanley, not Daly, had said to Leonard of a man, Calla, who was in the hallway away from where Stanley and Leonard were talking. In response to a question by Leonard as to who the man was [R. T. 6362], the court allowed Leonard to testify [R. T. 6367]: "He (Stanley) said that Mr. Calla had been in the penitentiary for murder and I said, 'Murder?' He said, Yes he beat them to death. He was a strong-arm man."

This was inexcusable. With this kind of "evidence" permitted to be considered by the jury, petitioner was effectively prevented from having a fair trial.

Conclusion.

The petition for writ of certiorari should be granted and the judgments reversed.

Respectfully submitted.

WILLIAM B. BEIRNE,
A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Paul John Carbo, Frank Palermo, Joseph Sica, Louis Tom Dragna, and Truman K. Gibson, Jr., Appellants, vs. United States of America, Appellee. No. 17,762. Feb. 13, 1963.

Upon Appeal from the United States District Court, for the Southern District of California, Central Division.

Before: Barnes, Hamlin and Merrill, Circuit Judges.

Merrill, Circuit Judge.

Appellants stand convicted of extortion affecting commerce and conspiracy to extort in violation of 18 U.S.C. § 1951, commonly known as the Hobbs Act,[1] of the interstate transmission of threats and conspiracy

---

[1] "(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

to transmit in violation of 18 U.S.C. § 875(b),[2] and of conspiracy to commit an offense against the United States under 18 U.S.C. § 371.[3] They were variously charged in ten counts of an indictment by the Grand Jury of the Southern District of California, Central Division. On May 30, 1961, following trial, they were found guilty by jury verdict and on December 2, 1961, were duly sentenced. They have appealed from their several judgments of conviction.

The case involves in general the business of professional boxing and fight promotion and, more specifically, the efforts of appellants to secure managerial control of Don Jordan, a welterweight fighter, by bringing pressure to bear on his manager, Donald Nesseth. These efforts were prompted, according to the theory of the United States as expressed in its brief, by the fact that "* * * 'control' of champions and top contenders was the only significant profit factor in the operation of the boxing business. The evidence shows that 'control' was effected and maintained through matching controlled fighers with one another and that the technique for obtaining this control was to capture the fight manager through use of economic and, as a last resort, physical coercion."

---

[2] "(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

[3] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Since the contentions on appeal relate importantly to the sufficiency of the evidence, the facts must be dealt with at some length.

THE FACTUAL BACKGROUND

The matching of controlled fighters has already been considered by the federal courts in proceedings brought against the International Boxing Clubs of New York and Illinois for violation of the Sherman Act. International Boxing Clubs vs. United States, 1959, 358 U.S. 242, affirming United States vs. International Boxing Clubs, S.D.N.Y., 1957, 150 F.Supp. 397. Since these proceedings figure directly in the background of the case at bar, a reference to the facts there established is helpful. The Supreme Court, at pages 245-246 recites:

> "The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtainining from each of the four leading contenders exclusive promotion rights including rights to radio, television and movie revenues. Upon securing these exclusive contracts Louis assigned them to the appellant International Boxing Club, Illinois * * *."

The opinion then recites that Norris and Wirtz organized the International Boxing Club of New York and for it acquired control of Madison Square Garden and entered into other contracts. The opinion then states, at pages 247-248:

"This series of agreements, consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship divisions, i.e., heavyweight, middleweight, and welterweight. Not satisfied with this temporary control, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, for a period of from three to five years. Over the facilities for the staging of contests appellants exercised like control, owning or managing the 'key' arenas and stadia in the Nation.

* * *

"The effect of the conspiracy is obvious. Using the facilities of I.B.C., Illinois, and I.B.C., New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a contender thereafter was clear, i.e., to sign with appellants or not to fight."

Later, at page 254, the opinion states:

"This illegal activity gave appellants an odorous monopoly background which was known and still feared in the boxing world."

By the decree Norris and Wirtz were directed to divest themselves of their stock holdings in Madison Square Garden. The boxing clubs were ordered dissolved. All exclusive agreements for the promotion of boxing events were banned.

Appellant Truman Gibson, a Chicago attorney, represented Joe Louis in 1949 at the outset of the sequence of events described in the Supreme Court opinion and from their inception was active in the affairs of the International Boxing Clubs. In 1958 he was made president of both clubs. It is the government's position that as antitrust pressure was applied to the clubs they ceased their practice of requiring that exclusive management be granted to the clubs; that the practice of securing exclusive management agreements was continued by Appellants Carbo and Palermo and that Appellant Gibson, with full knowledge of Carbo's practices and methods of operation, continued, through his dealings with Carbo and for their mutual advantage to match Carbo-controlled fighters.

Carbo, with a background of underworld association, emerges as the leader of the conspirators. Gibson's first contact with him came shortly after the boxing clubs were organized sometime in 1950. From time to time between 1954 and 1957, Gibson caused payments amounting to approximately $40,000.00 to be made to Carbo by the boxing clubs through the device of placing Carbo's wife, Viola Masters, on the clubs' payrolls for fictitious employment. Payment was explained by Gibson as being for the purpose of securing Carbo's good will and of preventing fighters or managers with whom Carbo had "influence" from becoming antagonized or alienated. In investigations conducted by the United States Senate, Gibson had explained why Carbo's wife had been employed rather than Carbo himself: "Because it looked a little bit better on our records, not ever considering the possibility of being called before a senate investigative committee, to have Viola Masters down

instead of Frank Carbo." Both before the Senate committee and in trial below, Gibson acknowledged that in their operations the boxing clubs had had dealings with the underworld. This practice was resorted to in order "to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements." Gibson testified that the boxing clubs would use "everyone" they could to prevent fixed fights and that in "everyone" he included the underworld. On redirect examination Gibson was asked whether it was "the policy of the International Boxing Club or any other organization with which you were connected in the fight business to use force or violence or threats of force and violence * * *" to which Gibson replied "No indeed." On re-cross-examination he was asked: "Of course, Mr. Gibson, when you used various people to achieve your ends you didn't know what those other people were doing on your behalf, did you." To which Gibson answered: "Not completely, no."

The district court judgment in the antitrust action was rendered in March, 1957. Commencing in the summer of 1958 Gibson sought to extend the influence of the boxing clubs to the west coast. At that time there were two exhibition halls in Los Angeles suitable for the staging of boxing contests: the Hollywood Legion Stadium and the Olympic Auditorium. Gibson moved to secure control of both.

At this time he was in charge of promoting weekly the two nationally televised boxing contests: Wednesday night on ABC and Friday night on NBC. At least $180,000.00 a week was received by the boxing clubs in connection with these promotions. The possibil-

ity of sharing in the television profits provided an incentive to deal with Gibson. A new organization known as the "Hollywood Boxing and Wrestling Club" was established by Gibson and his associates to lease the Hollywood Legion Stadium. The International Boxing Clubs lent $28,000.00 to this organization to commence operation. Named as president of the new organization and acting as its promoter and matchmaker was Leonard Blakely, known professionally (and hereinafter referred to) as "Jackie Leonard." Leonard's vulnerability to economic pressure from Gibson is apparent. Not only was his club indebted to Gibson's organizations but his future was largely dependent on Gibson's good will with respect to participation in the televising of contests.

In the fall of 1951, Virgil Akins, a Carbo-controlled fighter, was welterweight champion. A promising contender was Don Jordan, who was managed by Donald Nesseth. Nesseth had been making repeated efforts to obtain fights for Jordan on national television and had enlisted Leonard's support in this respect. With Gibson's assistance Leonard secured one such fight at the Legion Stadium with the fighter then ranked as the number one contender in the welterweight ranks. Jordan won this and two other televised bouts and became the leading contender for the title. A fourth match at the Olympic Auditorium in Los Angeles was arranged for October 22, 1958, and Gibson assured Nesseth that Akins, the champion, had agreed to defend his title against the winner of the bout. Jordan won.

The sequence of events which are now related are based in large part on the testimony of Jackie Leonard and in many respects are vigorously denied.

On October 23, 1958, while Nesseth, Leonard and Gibson, at the Olympic Auditorium, were discussing the anticipated championship fight between Akins and Jordan, Gibson received a telephone call from Appellant Palermo. Gibson spoke briefly and then handed the phone to Leonard, saying that "Blinky" wanted to speak to him. Palermo told Leonard, "We are in for half the fighter [fifty per cent of the manager's share] or there won't be any fight." Leonard protested that he had never heard of any such proposition before, and Palermo, upon learning that Gibson had not explained the situation, told him to talk it over with Gibson and call him back. When Leonard recounted the conversation, Nesseth flatly refused. Gibson explained that Carbo and Palermo controlled Akins and apologized for not having informed him of Palermo's demands earlier.

Gibson, Nesseth and Leonard met later in the day at Gibson's hotel for purposes of privacy and continued to discuss Palermo's demands. According to Leonard's testimony, Gibson said: "You know how Carbo and Blinky [Palermo] are * * *. They want all of everything before you can get a welterweight title fight * * * [but] go along with it. It has been done before. That is the way the welterweight and lightweight title has been worked since Carbo and Blinky got into the picture." Gibson proposed that Nesseth should tell Palermo that he agreed, and assured Nesseth and Leonard that he, Gibson, would straighten things out later in Chicago. Nesseth refused. He feared violent retaliation if Carbo and Palermo, falsely informed that Nesseth had yielded, should later discover that he had no intention of surrendering an interest in Jordan. He testified:

"* * * we reminded Truman [Gibson] that these weren't kids that we were talking to, and that he couldn't do very much protecting from 2,500 miles away, if they decided to start playing rough, and Truman scoffed at that and said that went out with high-buttoned shoes, that there wouldn't be any of that, and not to worry, that he would straighten it out." Gibson finally persuaded Leonard to call Palermo and to tell him the arrangement was satisfactory. This Leonard did, learning from Palermo that Gibson had already advised him that everything was all right.

On December 5 Jordan defeated Akins and became the welterweight champion of the world. The fight arrangements called for a re-match if Jordan won, with Palermo's share of both fights being payable after the re-match. Jordan won the re-match.

Between these two matches, Jordan on January 22, 1959, fought a match with another fighter, Gutierrez. Leonard asked Gibson who was to pay Palermo's share of that fight and Gibson said that if necessary he would pay it himself.

After the Gutierrez fight, when the money was slow in coming, Palermo telephoned Leonard, screamed and shouted that he was being stalled and double-crossed. Leonard tried to pacify him by telling him that he had seen Gibson that day and that the money would be sent. Palermo said he didn't want to hear anything about Gibson; that he was holding Leonard and Nesseth responsible and that Leonard was expected to handle Nesseth. Carbo then took the phone from Palermo and, according to Leonard's testimony, "He said 'You son-of-a-bitching double-crosser.' He said, 'You are no

good,' and he says, 'Your word is no good. Nothing is no good about you.' He said, 'Just because you are 2,000 miles away, that is no sign I can't have you taken care of.' He said, 'I have got plenty of friends out there to take care of punks like you.' He said, 'The money had better be in.' * * * I was trying to get a word in edgewise, to tell him the money would be sent that day. He wouldn't let me say anything, he was just cursing and hollering at me and saying there would be somebody out here to take care of me, and if that money wasn't there right away somebody would be looking me up."

Leonard was badly frightened by the conversation. After hanging up he turned to Nesseth, who had been standing next to the telephone booth, and told him everything that had been said. Nesseth noticed that Leonard was "shaken up, nervous."

Leonard later, by arrangement with Gibson, sent his personal check for $1,725.00 to Claire Cori (Palermo's wife) and was reimbursed by Gibson.

During this period of time Palermo and Gibson both began to express an interest in matching Jordan with Sugar Hart, another Carbo-controlled welterweight. Nesseth was not interested. The match would be a hard one and Nesseth felt easier matches would be more profitable and less risky.

The Jordan-Akins re-match was held in St. Louis on April 24, 1959. Palermo immediately demanded his share from Nesseth. Nesseth flatly refused to pay anything and explained that he had never consented to surrender an interest in Jordan and the circumstances under which Leonard and Gibson had stated the con-

trary to Palermo. Palermo's final comment was that "'The Man' isn't going to like this." Palermo called Leonard and, according to Leonard's testimony: "He told me I would be hearing from him right away, I better do something to straighten this mess out or I was going to get into a lot of trouble with the people back East."

On April 28 Nesseth and Leonard were in Leonard's office when a call came from Carbo. Leonard testified: "* * * the voice said, 'Hello, hello, hello. You know who this is?' I says, 'Yeah, I know who this is.' And he says, 'You're a no good'—and he used some vulgar language and called me a double-crosser and told me that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead, and he called me another S.B. and different names, real bad names, 'double-crosser,' and he says, 'We are going to meet at the crossroads,' he says, 'You will never get away with it. I have had that title 25 years and no punks like you are going to take it away from me,' and he repeated that statement, he says, 'When I mean get you, you are going to be dead,' he said. 'We will have somebody out there to take care of you.'"

Nesseth testified: "What I heard from Leonard's end of the conversation, there wasn't very much conversation on his part. One or two times he stammered and said, 'You shouldn't say those things.' But the call, I would say it was very one-sided, and I did notice and observe that Leonard turned about the color of your shirt during the course of that conversation.

and when the phone call was over and he hung up the phone he sat there just for a second and he got up and ran across the hall to the ladies' room, which we used during the daytime as a men's room, and he vomited. I have never seen anybody any more shaken up than he was at that time."

A few minutes later a telephone call came from Palermo. Leonard testified: "And he said, I was a double-crosser and I was no good and he was coming to the coast and he was going to see some people and they were going to see me. And I told him there was no good to come, and I was mad, I was very mad, and I hung up on Blinky."

Later, at Leonard's home, he received another call from Palermo which he described as follows: "He wanted to know if I cooled off yet and said, 'Jesus, there is no use being like that.' He says, 'After all, maybe the guy shouldn't have called like that, but' he said he figures he had a right to, 'they have had that account a long time and you people out there are double-crossing him.' He said, 'Now, we might as well be like gentlemen and not be mad,' and he says, 'I will be out there and talk to you.' I said, 'There is no use of coming out here, I am fed up with all of you,' and I told him he would have to see Nesseth and he said, 'I can't see Nesseth unless he will sit down and talk to me.' And I said, 'You will have to take care of that, there is nothing I can do about it. Nesseth doesn't want to talk to any of you and if you want to talk with him, you will have to make your own contact with him.' With that he said, 'Well, I will be out there in a few days and we are going to look you up.'"

On April 30 Gibson, who had been notified by Leonard of the threatening calls, telephoned Leonard and offered to pump additional capital into the Hollywood Club if Leonard would persuade Nesseth to agree to a Hart fight. On the same day Palermo arrived in Chicago from the east and stayed at the Bismark Hotel (owned by Norris and Wirtz) at the expense of the Boxing Clubs. On May 1 he met with Gibson and Hart's manager in the lobby of the hotel and thereafter left for Los Angeles.

On May 2 Leonard had a telephone call from Palermo summoning him to a late night meeting at a Los Angeles hotel. He entered the hotel to find Palermo in company with Appellant Sica. Describing his reaction to Sica's presence in company with Palermo, Leonard testified: "Well, the minute I seen him I remembered what Carbo had told me before about somebody on the west coast taking care of me and for once I was scared, when I seen him. * * * Well, by reputation I had always known of Joe Sica as an underworld man and a strong-arm man."

In their conversation, according to Leonard, Sica stated: "He says, 'Look Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt. Wouldn't you rather go grab him by the neck and straighten him out, than for me to go back, tell "The Gray"? You try it, you are all right, but it is Nesseth that is no good.' 'The way it is now,' he says, 'you and Blinky have both got your necks in a sling,' and he said, 'Something has got to be straightened out.' He said, 'If you have to, go out and beat the hell out of Nesseth. If you need any help we will go with you and help you and drag him out of bed.'"

Also, referring to Palermo, Leonard stated: "Well, Blinky said, 'That is the only answer to the whole problem,' was for me to convince Nesseth to fight Sugar Hart and that that would straighten things out, as far as Carbo was concerned. And Sica agreed there, too. He said that I had my head in a noose and that was the only way I was going to get the thing straightened out, was to grab hold of Nesseth and make him take the fight with Sugar Hart."

The following day Nesseth called Gibson to complain of the threats that had been received. Gibson disclaimed responsibility but, according to Nesseth, "Truman said, 'Well, all the pressure can be relieved and you can also do your own Jackie Leonard a favor by saving his Club, if you will just agree to fight Sugar Hart.' And I told him they could forget that, because I had better things in mind and I wasn't going to fight Sugar Hart. We must have talked for probably 15 minutes and Truman agreed that he would call Norris and see what he could do about getting these people out of town."

On May 4, while Nesseth and Leonard were in Leonard's office, Palermo appeared and, shortly thereafter, Appellant Dragna. Nesseth immediately left the room. Palermo, in Leonard's pressence, then explained the problem to Dragna and asked what Dragna thought of it. According to Leonard: "Dragna says, 'Well, you are wrong, Jackie. You are dealing with big people and your word should be your bond.' He says, 'After all, if your word is no good, then you are no good in this game. Everything is dealt—you are dealing with real nice people and big people, and if your word is no good you are no good in this game.'"

Dragna inquired about Nesseth; whether he did not live out his way in West Covina and again whether he did not have a wife and child. Later, according to Leonard, Palermo stated: " 'Well, we have to make this Hart fight. At least, if I can go back and tell "The Old Man" '—meaning Frank Carbo—'tell him I have the Hart fight, that will take a lot of pressure off. I can tell him you tried and I tried and at least we have something accomplished.' He said, 'I am going to leave,' and he said, 'I want you to make sure things are taken care of.' Dragna told me, he says, 'You are right in the middle of this thing, Jack.' And he said, 'You better try to get it straightened out or,' he says, 'you can be in a lot of trouble.' "

As with Sica, Leonard understood that Dragna was connected with the underworld and associated his appearance with Carbo's threat. Nesseth also testified that he understood both Sica and Dragna were connected with the underworld. Dragna's appearance so upset him that he immediately sought and obtained police protection.

On May 5 an induction coil connected with a tape recording machine was placed beside Leonard's home telephone, with his consent, by the Los Angeles Police, and his office was equipped with a concealed microphone.

The following day Sica and Palermo called on Leonard and Nesseth at Leonard's office in an effort to persuade Nesseth to agree to a fight with Sugar Hart. The visitors received no satisfaction. As Sica was leaving, he leaned over Leonard and, according to Leonard, whispered in his ear: "Jackie, you are it." Nesseth con-

firmed that Sica had whispered in Leonard's ear as he was leaving.

On May. 7, in telephone conversation with Gibson, Leonard had reported that Nesseth was still refusing a fight with Hart. Gibson stated, "Well, it's too bad. I could have saved the club if I could have made that fight."

On May 11, Gibson flew to Los Angeles with William Daly, named as an unindicted co-conspirator. Leonard was out of town and was telephoned by Gibson, who advised that he had to return to Chicago but was leaving Daly there to talk to Leonard.

On May 13, after Leonard had returned, Daly called on him at his office. He wanted to know what Leonard was going to do about the money owed to Gibson. He said Leonard was in "hell of a jam" both regarding his club's financial obligations and regarding Nesseth. He said: "Carbo is really boiling." He told Leonard to call and see him at his hotel the next day.

The following day Leonard was equipped by the police with a Minifon wire recording device and also with a portable transmitting device. He then called on Daly. A lengthy conversation ensued, all of it taped.

According to Daly, Gibson was upset, saying he was in "a jackpot" because he had allowed the title to get out of "their" hands. He had accused Leonard and Nesseth of trying to destroy him, and had stated that instead "I'll have them destroyed." There was a discussion of a near fatal assault on Ray Arcel, a Carbo-controlled manager who had asserted his independence. Daly explained the technique of assault:

"See what they do. They use a water pipe, see, You know, regular lead water pipe. Lead pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see— * * * Just an ordinary piece of paper, that's all they ever use. And you sitting in a crowd. And they try to give you two bats, and they kill you with two if they can. But they whack you twice and split your—fracture your skull, and knock you unconscious, and they just drop it, they can't—there's no heat. You can't—you haven't got no weapon on you. If they said you did it, what the hell, you drop it in a crowd or out in the street. They drop it immediately. After they do it they drop it. And after they drop it—the law—they're protected by the law. They have to have witnesses. They seen them come out and that's the guy, and that's what he used." And later: "They used a couple kids from Boston to do it." Leonard: "They always use professionals, guys from out of town." Daly: "Yeah, they were kids." Leonard: "Like here, if they wanted Don and I, they're not going to use somebody that we know around here." Daly: "No. The Sicas would be home."

Leonard inquired as to why Sica was becoming involved in something not his business. Daly replied: "Well then, people in New York do them favors," and later: "I don't know what way they're going to handle that Nesseth, but they are going to handle him some * * * way." Daly complained of having to stay in Los Angeles. "I got a lot of things home to try to straighten out. But Truman says, 'Wait 'til Monday.' He's coming in Monday. What'll happen Monday, Jack?"

Leonard explained how he hoped to get financial aid for his club from a San Francisco promoter, Don Chargin, and stated that now Sica wanted to see Chargin. Daly stated: "Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people. * * * You know. So it'll make the guy think a little bit, too, you know."

On June 4 Chargin was planning a trip from San Francisco to Los Angeles in connection with his negotiations with Leonard to take over the failing Hollywood Boxing and Wrestling Club. He received an anonymous telephone call as to which he testified: "The call stated to stay out of Hollywood and that they knew my flight number and also that 'you saw what happened to Jack Leonard' * * *." Leonard had received a beating and had been hospitalized.

In September, 1959, Leonard's club failed and went into bankruptcy. Since Leonard could no longer obtain nationally known fighters, he quit the boxing business.

Also in September the indictment against these appellants was returned.

The indictment contained ten counts. Two of the counts charged all of the appellants (together with unindicted co-conspirator William Daly) with conspiracy: Count 1 with a conspiracy to commit extortion;[4] Count

[4]Paragraph 3 of this count reads as follows:

"The objects of such conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches be-

5 with a conspiracy to transmit threats by means of interstate communications.

---

ing nationally televised, to wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

"c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

"d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize-fighter Don Jordan."

[5]Paragraph 3 of this count reads as follows:

"The objects of said conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth and Leonard Blakely without payment of considerations for the monies and control so received."

Subparagraphs c. and d. are substantially the same as those set forth in footnote 1 as to Count 1.

In eight counts Appellants Carbo, Palermo and Sica were charged with substantive offenses. Carbo and Palermo were charged in Counts 3 and 2, respectively, with obtaining the sum of $1,725.00 from Leonard through threats of physical injury and violence. Palermo and Sica, in Count 4, were charged with attempts to coerce Nesseth through fear and threats of violence into giving up part of his contractual control of Jordan by signing a match with Sugar Hart. Carbo and Palermo, in Counts 6, 7, 8, 9 and 10, were charged with the interstate transmission of threats to injure Leonard and Nesseth.

By jury verdict all defendants were found guilty as charged. The following sentences were imposed:

Carbo: Imprisonment consecutively for twenty years on Count 1 and five years on Count 3, a total of twenty-five years, plus a fine $10,000.00.[6]

Palermo: Imprisonment for fifteen years on Count 1, plus a fine of $10,000.00.[7]

Sica: Imprisonment for twenty years on Count 1, plus a fine of $10,000.00.[8]

Dragna: Imprisonment on Counts 1 and 5 for five years each to run concurrently.

---

[6]On Counts 5, 7 and 9, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the twenty-five years imposed for Counts 1 and 3.

[7]On Counts 2, 4 and 5, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the fifteen years imposed for Count 1. Likewise, imprisonment consecutively for five years each on Counts 6, 8 and 10, a total of fifteen years, was made to run concurrently.

[8]A sentence of five years on Counts 4 and 5 was made to run concurrently.

Gibson: Imprisonment on Counts 1 and 5 for five years each to run concurrently, plus a fine of $10,000.00. Imprisonment was then suspended and Gibson was placed on probation for a period of five years.

SUFFICIENCY OF THE INDICTMENTS

Appellants make several attacks on the indictments. First, it is contended that Counts 1 through 4 failed to allege offenses cognizable in the federal courts because there is no sufficient showing that the extortion charged affected commerce. It is asserted that neither a contract between one fighter and his manager nor a share of the fighter's purse constitutes commerce.

Under the Hobbs Act (as distinguished from the Sherman Act) it is not necessary that the subject of the extortion constitute commerce. All that is required is that trade or commerce be affected by extortion "in any way or degree." The quantum of effect under the Hobbs Act is thus entirely different from that required under the Sherman Act.[9]

This is clearly pointed out in United States vs. Malinsky, S.DN.Y., 1956, 19 F.R.D. 426, 428, denying a motion to dismiss an indictment for failure to allege with sufficient particularity the manner in which the claimed extortion affected commerce. There it was stated:

> "Whereas under that Act it may be that a court must find that the acts complained of have a direct and substantial effect on interstate commerce, under the subject statute there is no need for such

---

[9]See Hulahan vs. United States, 8 Cir., 1954, 214 F. 2d 441, 445; cert. den., 348 U. S. 856 (1954).

a finding. The statute provides that effect in 'any way or degree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. The substantiality of the effect is not left to judicial determination. * * * Congress quite understandably might prohibit extortion or conspiracies based on extortion which affect interstate commerce in any degree. Their corrosive quality is not likely to be subject to quantitative measurement to the same extent as the economic effect of combinations in restraint of trade."

In United States vs. International Boxing Club, 1954, 348 U.S. 236, it was held that the business of promotion of professional championship boxing contests and the selling of rights to televise, broadcast and film such contests for interstate transmission constituted commerce within the Sherman Act.

Here it can hardly be denied that such commerce is affected in some degree by extortion to obtain control of a champion fighter. A sufficient effect on commerce under the Hobbs Act has then been charged.

Further attacking the sufficiency of Counts 1 through 4 to charge a federal offense, appellants contend that the Hobbs Act is vague and uncertain in its application to the boxing business, and may not constitutionally be applied to the charged acts of extortion.

Undeniably the act was particularly aimed at labor racketeering, but by its terms it is not so limited.[10]

[10]The legislative history of the bill indicates that while most of the drafting problems presented by the bill related to its

Racketeering in other areas is clearly included. The language of the statute provides fair warning and adequate notice that extortion in any area is included so long as the necessary effect upon commerce results.

It is contended that Counts 1 and 5 fail to meet the requirement of Rule 7(c), F.R.Cr.P., that they provide "a plain, concise and definite statement of the essential facts constituting the offense charged." It is asserted that they do not allege how interstate commerce was to be delayed, obstructed or affected by the charged conspiracy; or how the threats charged could yield control of Jordan or a share of his purse; or what agency of interstate commerce was to be used to convey the alleged threats; or between what points these threats were to be communicated.

It is not necessary to plead such evidentiary detail.[11] Subparagraph 3 of each count clearly alleged the scheme for accomplishing the criminal goals of the conspiracy, including reference to the role each of the five defendants was to play in the attainment of these goals. This is sufficient.[12]

It is also contended that the substantive counts relating to the threatening communications did not charge offenses since they failed to contain any allegation determining venue.

Rule 7(c) does not require venue to be pleaded. Since it is waivable,[13] it is not an essential fact constituting

---

coverage of labor activities, the bill was broadly conceived as of part of a legislative plan to deter professional gangsterism. S. Rep. No. 1440, 73d Congress, 2d Session.

[11]Wong Tai vs. United States, 1927, 273 U. S. 77.

[12]Schino vs. United States, 9 Cir., 1954, 209 F. 2d 67, 69, cert. den., 1954, 347 U. S. 937.

[13]Rodd vs. United States, 9 Cir., 1948, 165 F. 2d 54.

the offense charged.[14] Defendants have the right to be tried in the proper forum, not the right to be charged with the proper venue.[15]

In this case a bill of particulars giving full details respecting venue was filed one month after the indictment was returned. There was then no possibility of prejudicial surprise.[16]

The contention that § 1951 is not within the power of Congress and contravenes the Tenth Amendment was refuted in Nick vs. United States, 8 Cir., 1941, 122 F. 2d 660, cert. den., 314 U.S. 687, reh. den., 314 U.S. 715, reh. den., 316 U.S. 710 (1942). The conspiracy and substantive offenses under § 1951 do not merge.[17] Nor is the § 371 conspiracy identical with the § 1951 conspiracy.

We conclude that in all respects of which the appellants complain, the indictments sufficiently charge the federal offenses to which they were directed.

SUFFICIENCY OF THE EVIDENCE

All defendants assert a lack of substantial evidence of guilt upon all counts in which they were charged. Our discussion of this contention is, of course, subject to our later discussion of other assignments of error in which attack is made upon specific portions of the record.

---

[14]See Rule 12(b)(2), F.R.Cr.P.

[15]Suggestions by Carbo and Gibson that they were not tried in the proper state and district are not open to consideration since no motion for change of venue under Rule 21(b) was made below.

[16]Compare, Bratton vs. United States, 10 Cir., 1934, 73 F. 2d 795.

[17]Callanan vs. United States, 1961, 364 U. S. 587.

Accepting the facts and the testimony as we have recited them, the contentions of Garbo, Palermo and Sica may be summarily dismissed as to the substantive counts. Their contentions are founded in large part upon an attack on the credibility of Leonard. We shall not disturb the jury's determination in this respect.

Likewise, as to the Count 1 conspiracy the evidence is amply sufficient as to these three appellants. Their active and joint participation in overt acts which themselves constituted substantive offenses leaves little doubt but that they knowingly acted in concert and pursuant to plan.

Likewise, as to the Count 5 conspiracy there can be no doubt but that Carbo and Palermo knowingly acted in concert and pursuant to plan.

As to the Count 5 conspiracy there is no evidence that Sica and Dragna entered the plot before the interstate threats had been communicated and the conspiracy fully consummated. We find no evidence that they had any knowledge of the plot at the time of the interstate threats nor anything from which an inference of conspiratorial association or agreement at that time might be inferred. The jury's verdict upon Count 5 should have been set aside as to these appellants. As to Appellant Sica the court's failure to do this is without prejudice in the light of his twenty-year sentence imposed for Count 1 and the concurrent five-year sentence upon Count 4.[18]

As to Appellant Dragna, after careful consideration of the record we have concluded that there is no suf-

[18] See Hirabayashi vs. United States, 1943, 320 U. S. 81.

ficient evidence to hold him guilty upon Count 1. The only evidence is as to the occasion on May 4, 1959, which we have recounted, when Dragna appeared with Palermo and talked to Leonard (plus evidence that Dragna and Palermo had been seen together a day or so earlier). On this occasion Dragna was simply asked what he thought and gave his opinion. Leonard, in testifying before the California Athletic Commission, described Dragna's participation as follows: "He didn't say anything, no threats. No—in fact, he was a very good gentleman there. He did very little talking. Listened."

There was nothing said which would suggest that Dragna was an interested party. There was nothing other than his presence with Palermo which could give rise to any sinister implications that he was lending his active support to a program of violence. The United States suggests that those having an underworld reputation have the burden of refraining from acting in such a fashion (or, it would seem, from being seen in association with others) when it might be construed as evincing an interested participation or a threat of violence. We cannot agree. Leonard may have been wholly justified in the conclusions he drew, but it does not follow that Dragna may be held criminally responsible for those conclusions.

As to Appellant Dragna the district court must be reversed and the sentence set aside.

As to Appellant Gibson, charged in the conspiracy counts, it must be noted that there are in fact two distinct conspiracies involved in the facts of the case. (1) The underlying conspiracy to gain control of Jor-

dan. For business reasons of his own, Gibson was interested in furthering Carbo's ends in this respect and it is clear that the evidence is sufficient to connect him with this underlying conspiracy. (2) The *charged* conspiracies to accomplish the underlying purpose by extortion and threatening communications.

The United States suggests that proof of the first is sufficient without more to constitute proof of the second. This is vigorously disputed by Gibson, who contends with justification that the existence of business relations with Carbo is in itself wholly consistent with innocence of the charged conspiracies.

The United States further emphasizes the fact that Gibson himself was guilty of acts of economic coercion in making it clear on at least two occasions that should Jordan sign with Sugar Hart Leonard's economic difficulties would be over, but that unless such a fight took place Gibson would be unable to save the Hollywood Boxing and Wrestling Club.

There can be little doubt that Gibson had his own business reasons entirely apart from those of Carbo and Palermo for wishing such a fight to take place. The question is whether the record can support a determination that for these independent business reasons Gibson became a party to the Carbo-Palermo scheme for achieving control of Jordan through extortion and threats. In our view it does through proof of Gibson's connection with Daly.

Gibson brought Daly to Los Angeles in order to confer with Leonard and delegated Daly to act as his representative in discussions with Leonard. Gibson advised Leonard to this effect. One may logically con-

clude that in what Daly said, he spoke for Gibson and what he said related to Carbo and Palermo and was calculated to freighten Leonard into renewed efforts with Nesseth.

Accordingly, we conclude, subject to later discussion of specific points, that while judgment must be reversed as to Appellant Dragna the evidence is sufficient to support the jury verdict as to Appellants Carbo, Palermo and Gibson and, as to Appellant Sica, the verdict on Counts 1 and 4.

DECLARATIONS OF CO-CONSPIRATORS

A substantial part of the proof on the conspiracy counts consisted in what various of the co-conspirators out of court had said about their fellow conspirators. All appellants have most vigorously protested the admission of such declarations as hearsay and have contended that the district court failed adequately to instruct the jury respecting the conditions under which such declarations may be used against conspirators other than the declarant.

It is well established that the declarations of one conspirator in furtherance of the objects of the conspiracy, made to a third party, are admissible against his co-conspirators.[19]

It is also well established, however, that such declarations are admissible, over the objection of a co-conspirator who was not present when they were made, only if there is proof independent of the declaration that he is connected with the conspiracy. Glasser vs. United States, 1942, 315 U. S. 60, 75: "Otherwise

[19]Logan vs. United States, 1892, 144 U. S. 263, 309.

hearsay would lift itself by its own bootstraps to the level of competent evidence."

The following instruction was offered and was rejected:[20]

> "You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the tentative basis is destroyed and all such testimony must be ignored as to him.

---

[20]The district court in its charge to the jury did deal with the substance of this instruction as to Appellant Gibson. It charges:

"You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy."

Also, in admitting certain declarations of Appellant Palermo, the court stated:

"I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the conspirators. But that rule only applies if there are co-conspirators.

"Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator."

"A defendant's connection with a conspiracy must be established beyond a reasonable doubt, accordingly, by his own conduct and his own statements or declarations."

We cannot accept appellants' view of the law as set forth in the proposed instructions. The declarations, as to defendants other than the declarant, constitute hearsay. Yet with a proper foundation they would qualify under the well recognized exception which permits the introduction of declarations of a co-conspirator.[21] The problem of co-conspiratorial declarations, then, is one of the admissibility of evidence under a well recognized exception to the hearsay rule. It is not a substantive question as to the qualitative sufficiency of the evidence necessary to prove the existence of a conspiracy.[22]

The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant

---

[21]The necessary foundation consists of three distinct prerequisites. First: that the declaration is in furtherance of the conspiracy; second: that it was made during the pendency of the conspiracy; third: that there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it. See authority, infra, footnote 22; Uniform Rules of Evidence, 63(9); Model Code of Evidence, Rule 508(b). Only the third element is controverted here, save as may hereafter be discussed.

[22]See: 4 Wigmore, Evidence (3d Ed., 1940) §1079; see generally: Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 984-989 (1959); Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954).

In analyzing this question, every case that has come to our attention has done so from the point of view of whether the declarations were "admissible" or "competent" evidence. Most recently in Wong Sun vs. United States, 1963, ... U. S. ....., ..., the Supreme Court has recognized that "the rule which regulates the use of out-of-court statements is one of admissibility, rather than simply of weight, of the evidence."

but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits.[23] The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law, as set forth in the proposed instructions, is that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.

Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declarations at all. The district court in effect will have told the jury, "You may not consider this evidence unless you first find the defendant guilty."

The point is made in United States vs. Dennis, 2 Cir., 1950, 183 F. 2d 201, 230-231, affirmed 1951, 341 U. S. 491, where it is stated:

> "It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what

---

[23]See discussion, Maguire and Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence, 1927, 40 Harv. L. Rev. 392, 415.

the jury had already decided. In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all."

In Rowley vs. Braly, 1926, Texas Civil Appeals, 286 S. W. 241, 245, the same thought is expressed:

"If the conspiracy is established, then what purpose can the declarations and statements introduced in evidence serve? * * * If this [rule giving the determination to the judge] is not correct, of what avail would the proof of such declarations be to the party offering them."

Finally, Maguire and Epstein, supra footnote 23, at page 407 (their footnote 47), agree that:

"If the other evidence satisfies the jury that the conspiracy has been entered into, the co-conspirator's declarations can fulfull no useful function."

We find the quoted authorities persuasive. To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt. It will not do to tell the jury that it must reach its determination first.

The rule of law for which appellants contend would then, effectively condemn this entire exception to the hearsay rule. This result we must reject.

Nor could this exception be rescued by giving the preliminary question to the jury to be decided by it upon the basis of a prima facie case rather than proof beyond a reasonable doubt. The jury is already concerned with the evidence-weighing standards involved

in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence, separating that produced by the declarations from all other, but as well to apply to the independent evidence the entirely different evidence-weighing standards required of a prima facie case, is to expect the impossible. As stated in Dennis, supra at page 231;

> "Indeed it is a practical impossibility for laymen and for that matter for most judges to keep their minds in the isolated compartments that this requires."

Indeed, the injection of the standards of a prima facie case into a jury determination (even though carefully isolated, by instructions, from the ultimate determination of guilt) might very well be found to cause confusion as to standards of proof highly prejudicial to the defendant.

Therefore, we adopt in this situation the orthodox prevailing view of the allocation of functions between judge and jury, which assigns to the judge decisions upon preliminary questions of fact determinative of the admissibility of evidence challenged under technical evidentiary rules.[24]

Our position is supported by language in United States vs. Dennis, supra at page 231:

> "The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the

[24]See Maguire and Epstein, supra.

> competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent."

It is for the judge then, and not the jury, to determine the admissibility of the declarations. In making this determination the test is not whether the defendants' connection had by independent evidence been proved beyond a reasonable doubt, but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made. Thereafter it is the jury's function to determine whether the evidence, including the declarations, is credible and convincing beyond a reasonable doubt.

The trial judge's finding on admissibility in no way restricts the jury's inquiry into guilt or innocence. As stated in United States v. Dennis, supra at page 231, quoting from United States v. Pugliesi, 2 Cir., 1945, 153 F. 2d 497, 500:

> "'The admissibility of the wife's declarations in the case at bar was for the judge, and the fact that the jury later acquitted her was irrelevant. The issue before him was altogether different from that before them: he had only to decide whether, if the jury chose to believe the witnesses, Pugliesi and his wife were engaged in a joint undertaking; they had to decide whether they believed the witnesses beyond a doubt.' No doubt, this conclusion permits the jury to act upon hearsay, because

> they may be satisfied of the 'joint undertaking' only because of the declaration; but it often happens that hearsay is competent, and this is the only practicable way to deal with the question."

It must be conceded that in many cases instructions such as that proposed by appellants have been held proper. We know of no case save one,[25] however, in which the failure to give such an instruction has been held error. Cases cited by appellant as holding to this effect we find distinguishable.[26]

Appellants assert that there was a lack of a prima facie case made out by independent evidence and that the declarations were inadmissible for this reason. We cannot agree. There was ample as to each appellant, as the district court on motion for new trial noted.

We conclude that it was not error to admit against the appellants the declarations of their co-conspirators, nor to fail to give the requested instruction.

---

[25]In Schmeller vs. United States, 6 Cir., 1944, 143 F. 2d 544, hearsay documents had been admitted in absence of an establishment of a prima facie case by independent evidence. The court agreed with defendants that the jury should not rightly have considered the hearsay evidence, but instead of noting error in the judge's failure to remove the evidence from jury consideration by an erasure instruction when the necessary showing had not been made, the court placed the blame on the judge's failure to instruct the jury to try the admissibility point for themselves. We cannot agree with this solution. When no prima facie case is made out, the rights of the defendants can hardly be protected by permitting the jury to find that the evidence was nonetheless admissible.

[26]Lutwak vs. United States, 1953, 344 U. S. 601, dealt with declarations not in furtherance of the conspiracy, which, it is well recognized, are limited in their application to the declarer alone. Oras vs. United States, 9 Cir., 1933, 67 F. 2d 463, where an instruction was held erroneous, involved lack of a prima facie case aliunde the declaration.

ELECTRONIC RECORDINGS AS EVIDENCE

Three electronic recordings of conversation were received in evidence over appellants' objection.

The Daly-Leonard conversation on May 14, 1959, was recorded by two independent methods. Leonard was equipped with a Minifon, a miniature wire recording device. The wire recording made on Leonard's person by this method was received in evidence. Leonard also was equipped with a miniature radio transmitter. The conversation was picked up in a neighboring room through a radio receiver and was there recorded on tape.

Appellants contend that these exhibits were inadmissible since they were secured in violation of the Fourth Amendment. They assert that Leonard obtained access to Daly's room under false pretenses amounting to an unlawful search and seizure.

We have held to the contrary upon this point in Todisco vs. United States, 9 Cir., 1961, 298 F. 2d 208, cert. den., 1962, 368 U. S. 989. Appellants request us to re-examine our decision in that case and overule it. We decline and adhere to our opinion as there expressed.[27]

Appellants further claim that these exhibits were inadmissible because secured contrary to 47 U. S. C., §301, which provides that "no person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * * except

---

[27]Accordingly, we find it unnecessary to discuss the question of whether these appellants have standing to assert a violation of Daly's constitutional rights.

* * *: with a license in that behalf * * *." Although Leonard had no license, "no policy against admission of evidence secured by the radio operation can be said to arise from such lack." Todisco vs. United States, supra at page 211.

On May 5, 1959, Palermo telephoned Leonard at his home and attempted to persuade him to come to a restaurant where Palermo and Sica were waiting for him. Palermo told Leonard that he had been contacted by Carbo and that he and Leonard had to place a call to Gibson. This conversation with Palermo was recorded by Leonard with the aid of a Los Angeles police officer through an induction coil placed beside Leonard's home telephone.

Appellants contend that this recording was inadmissible in evidence since it constituted a violation of 47 U. S. C. §605.[28] We disagree.

In Rathbun vs. United States, 1957, 355 U. S. 107, it was held that the contents of a conversation overheard on a regularly used telephone extension with the consent of one party to the conversation did not constitute an unauthorized interception.

Appellants would distinguish Rathbun upon the ground that use of an induction coil constitutes, me-

---

[28] ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person . . . and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purpose, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ."

chanically, a physical interception which is not the case with a regularly used extension phone. Again we disagree. As the record demonstrates, the induction coil is placed against the side of the telephone instrument where it serves as a listening device much in the nature of a tuning fork. There is no physical connection with or interruption of the telephone electrical circuit.[29]

But further, we do not understand that the mechanical nature of the method of overhearing is now to be guidepost in this area. The controlling principles, it would seem, are substantially the same as those which guided us in Todisco.

In Rathbun, at page 110, it is stated:

> "The clear inference [from the language of §605] is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it. The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose."

[29] Appellants further suggest that use of the induction coil violates some regulation of the Federal Communications Commission. No objection on this basis was made at trial and we are not referred to the regulation in question.

We find no distinction between holding out the handset and permitting an outsider to hear through the use of an induction coil.[30]

Nor does the recording of this legally overheard conversation render the overhearing and divulging of the conversation improper.[31]

We conclude that it was not error to receive these recordings in evidence.

SICA'S UNDERWORLD REPUTATION

Sica moved to dismiss the indictment against him (Counts 1 and 5) for the reason that he was unduly prejudiced by the charge in Paragraph 3(c) (see footnotes 4 and 5) that the conspiracy contemplated the use of "persons known to said victim to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence" and the enlistment of Sica for this purpose. The motion was denied. Sica also objected to the introduction of testimony by Leonard and Nesseth to the effect that by reputation they knew of Sica as an "underworld" man and a "strong-arm" man. The objection was overruled. Sica assigns error in these respects.

In discussing the admissibility of evidence of bad moral character the Supreme Court in Michelson vs. United States, 1948, 335 U. S. 469, 475, states:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort

---

[30]See Ferguson vs. United States, 10 Cir., 1962, 307 F. 2d 787; Carnes vs. United States, 5 Cir., 1962, 295 F. 2d 598, cert. den., 1962, 369 U. S. 861.

[31]Carnes vs. United States, supra, at page 602; see also Hall vs. United States, 5 Cir., 1962, 308 F. 2d 266, cert. den., 1963.

by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer vs. United States, 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[32]

The subjects of confusion of issues and unfair surprise will be discussed later.

Whether in this case prejudice was undue would seem to us to depend upon the purpose served by the charge, and the issue to which the prejudicial evidence was relevant, and a consideration of the probability of harm to the defendant in the light of these facts.

---

[32]See also: 1 Wigmore, Evidence, 3d Ed., 1940, §§55, 57; Uniform Rules of Evidence, Rule 47; Model Code of Evidence, Rule 306(1).

The nature of Sica's reputation was not introduced into the case for the purpose of characterizing him as a bad man likely to resort to the conduct with which he is charged. This was not the source of its relevance.

Instead the prosecution relied on the reputation of Sica as a probative fact enabling the jury to infer that Sica had intervened with Leonard and Nesseth knowing that his presence would instill fear in them and intending to manipulate this fear for the benefit of Carbo and Palermo; and further, to conclude that Carbo and Palermo had secured Sica's participation with full realization that his effectiveness was based upon the fear his reputation could inspire in the victims.

In cases of extortion based upon fear of violence the facts of fear, actual or anticipated, and of its reasonableness, are vital factors. To prove a substantive act of extortion it is essential to show the generation of fear in the victim.[33] To prove a substantive act of attempted extortion it is necessary to prove an attempt to instill fear. To prove a conspiracy to extort it is necessary to show a plan to instill fear.

Here Sica stood in the position of a dangerous weapon to be used to strike fear into the hearts of Leonard and Nesseth. It was part of the prosecution's case to charge and to prove that the conspirators considered Sica to occupy this position. That Leonard and Nesseth

---

[33]Bianchi vs. United States, 8 Cir., 1955, 219 F. 2d 182, 188-190, cert. den., 349 U. S. 915, rehearing den., 349 U. S. 969; Nick vs. United States, 8 Cir., 1941, 122 F. 2d 660, 671, cert. den., 314 U. S. 687, rehearing den., 314 U. S. 715, reh. den., 316 U. S. 710. See United States vs. Compagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U. S. 867, rehearing den., 325 U. S. 892.

considered him to be dangerous and that fear reasonably resulted from his appearance because of his reputation constituted relevant facts upon this part of the prosecution's case. "* * * there is a rational connection between the existence of the criminal agreement —'the partnership in crime'—and the fact that the acts upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed * * *." United States vs. Compagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U. S. 867 (1945), reh. den., 325 U. S. 892 (1945).[34]

---

[34]In this case Judge Learned Hand, disagreeing with the majority of the court, found the fact of fear irrelevant in a conspiracy case, although agreeing to its relevance in a case of substantive extortion. It does not appear from that case, however, that the plan of the conspirator was to instill fear in their victims. The opinion states at page 526:

> "So far as appears they did not expressly threaten violence but confined themselves to a pretense of union activity; they threatened to call strikes against their victims unless they were plentifully paid."

Judge Hand was of the view that evidence of the victim's fear of acts of violence incidental to the strike was irrelevant and inadmissible in absence of any showing that this fear was communicated to the conspirators.

Accepting that Judge Hand's minority view might have merit under the circumstances of that case, the situation appears entirely distinguishable from that at bar.

Here it is charged that fear of Sica was intended to serve as the very source of coercive power and the use of west coast enforcers had been expressly threatened. Furthermore, the victims' fearful states of mind here were fully disclosed to every one of the conspirators. Gibson from the outset knew that Leonard and Nesseth were apprehensive that Carbo and Palermo would resort to force and was requested by Leonard to intervene after Sica entered the picture. Palermo admitted knowledge that Leonard and his wife were frightened. Sica, himself, noting Leonard was taken aback by his presence, had asked Leonard whether "you feel there's some type of repercussions by me coming in here?"

It is true that (despite the precautionary steps taken by the judge as later discussed) the jury may have permitted this evidence to bear upon the probability of Sica's guilt. The question is whether this possibility renders such evidence unduly prejudicial and inadmissible. If so, the United States is precluded from establishing a material part of its case.

The question then is not whether the United States may use Sica's reputation as a sword against him, but whether he may himself make use of it as a shield to immunize himself from proof of the means by which the conspirators planned to freighten their victims into submission. If he may, then all who are known to live by violence are free to extort by the tacit threat of violence conveyed by their reputations; for the reasonableness of the resulting fear, as determined by its cause, may not be presented to the jury.

We cannot accept this result as a sound balance of the conflicting interests involved.

This, in our judgment (with such safeguards as were taken by the trial judge), is a proper case for application of what has been termed the "multiple admissibility doctrine." As stated in 1 Wigmore, Evidence (3d Ed., 1940) §13, page 300:

> "When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule."

In State vs. Beisle, 1920, 79 N. H. 444, 111 Atl. 316, 317, this doctrine was applied. There defendant Lyman was charged with assault upon a policeman. The victim, Fox, had sought to defend himself by drawing a gun. To justify this defense he was permitted to testify that Lyman was, Fox believed, a man who would resort to force. The court stated:

> "The argument that the disposition, character, and reputation of Lyman are not evidence that he assaulted Fox is sound. The difficulty with the defendant's case is that, while the evidence was not admissible for that purpose, it was clearly admissible to prove the reasonableness of the mode of defense from threatened attack adopted by Fox. As the evidence was admissible for some purpose, a general exception to it was unavailing."

To avoid confusion of issues and to foreclose the jury from using the reputation evidence to convict defendants on the "bad man" theory, the court below, upon admitting the testimony in question, instructed the jury as to the limited consideration which might be given.[35] The subject was again dealt with in the

---

[35] ". . . there is an old basic principle in American law respecting the trial of criminal cases, and that is that the reputation of a defendant is just not the thing in issue. You are trying a specific charge or a specific group of charges that are set forth in the indictment.

"Now, a person who is, generally speaking, a fine upstanding citizen might occasionally go out and commit an occasional crime, and a man who has a bad reputation might never commit one. He might not deserve the reputation, because reputation is something different from character. Character is the quality of person you are and reputation is what is believed in certain quarters regarding certain aspects of your life. It might be justified. It might not.

"So it would be very easy, unless the jury disciplines itself to consider the evidence for the purpose for which it is ad-

court's charge to the jury. We have no doubt but that to the maximum extent possible, prejudice flowing from any confusion of issues by the jury was eliminated.

There can be no question of unfair surprise. A pre-trial offer of proof upon this matter was made by the prosecution thirteen months before the trial commenced.

We conclude that the district court did not err in denying Sica's motion to dismiss the indictment or in admitting the evidence of Sica's reputation.

ANONYMOUS THREATENING TELEPHONE CALLS

In our statement of the facts we have recounted the receipt by Don Chargin of an anonymous telephone call just prior to his leaving for Los Angeles in connection with negotiations with Leonard to take over the Hollywood Boxing and Wrestling Club. The caller warned Chargin to stay out of Hollywood.

Appellants objected to this testimony as irrelevant for lack of connection to any of the appellants and highly prejudicial. After a considerable discussion of the objection out of the presence of the jury, the court concluded:

"I think the problem will be one for the jury. I have an ancillary problem, to properly instruct them.

---

mitted, to get off on the track of whether or not a particular defendant has a reputation of a certain kind or other.

"Now, it is contended here by the Government that this witness Leonard was put in fear of Mr. Sica and I think they are entitled to show or have Mr. Leonard tell why he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way."

You are invited to submit instructions on it, but the objections are overruled."

The jury was then advised by the court:

"The jury must of course bear in mind that the witness says this is anonymous. Now, what's anonymous ordinarily in life doesn't mean much, but sometimes what is anonymous is anonymous in form and you can fit it into the context of things. Whether this is the first situation or the second is going to depend upon the total context of the case, and just don't go deciding the issue on it until you have heard all the evidence and the instructions."[36]

Admission of this testimony under the circumstances is assigned as error.

The fact that Chargin could not identify the speaker does not necessarily render this testimony inadmissible. If identity could be found by the jury from other circumstances, admission of the testimony was proper.

The issue of authenticity—the identity of the author of a particular item of evidence such as a document or phone call—is for the jury once a prima facie case of authorship is made out by the proponent of the evidence.[37] The connection between a telephone

[36]No instructions upon this subject were offered.

[37]United States vs. Tellier, 2 Cir., 1958, 255 F. 2d 441, cert. den., 358 U. S. 821 (1958). See 7 Wigmore on Evidence, §2135; McCormick on Evidence, §194, Model Code of Evidence, Rule 601(a) (1942). That the procedure for handling the issue differs from that which we found proper with respect to declarations of co-conspirators is explained by the text writers. McCormick, supra at page 407, states:

"It must be noticed, however, that authenticity is not to be classed as one of those preliminary questions of fact conditioning admissibility under technical evidentiary rules

call and the caller may be established circumstantially.[38] The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent. The scope of appellate review upon this issue is confined to determining whether the admission constituted abuse of judicial discretion in determining that a prima facie case had been made out.[39]

Upon the record we cannot say that the admission of this testimony constituted abuse of discretion.

Daly, a member of the conspiracy, had told Leonard that this warning would most likely be given by the conspirators and why. A month prior to the warning Sica had surreptitiously contracted Leonard's assistant and attempted to have him ascertain when Chargin planned to be in town and where he could be reached by telephone.

These facts, plus the manner in which the warning so obviously fitted into the conspiracy scheme, are suf-

---

of competency or privilege. As to these latter, the trial judge will permit the adversary to introduce controverting proof on the preliminary issue in support of his objection, and the judge will decide this issue, without submission to the jury, as a basis for his ruling on admissibility. On the other hand, the authenticity of a writing or statement is not a question of the application of a technical rule of evidence. It goes to genuineness and relevance, as the jury can readily understand, and if a prima facie showing is made, the writing or statement comes in, with no opportunity then for evidence in denial. If evidence disputing genuineness is later given, the issue is for the jury."

[38]Andrews vs. United States, 10 Cir., 1935, 78 F. 2d 274. See 7 Wigmore on Evidence, §2155(1)(b).

[39]See Wigmore on Evidence, §2135 and cases cited therein; McCormick on Evidence, §194.

ficient to warrant reasonable men in concluding that the telephone call had been made by or at the direction of one of the conspirators in furtherance of the conspiracy, and thus, irrespective of the precise identity of the speaker, was binding on all appellants.

Appellants also assert as irrelevant and prejudicial Leonard's testimony to the effect that he had received threatening telephone calls between May 20 and November 1, 1959.

This testimony was given on redirect examination. On cross-examination appellants had attempted to impeach Leonard's credibility by showing that he had through his wife corruptly expressed a willingness to suppress his testimony and depart the country if he were paid $25,000.00.

On redirect examination the United States sought to explain this offer as founded not on corruption but on fear. The testimony of the threatening telephone calls was relevant to this issue and constituted a proper method of rehabilitating the witness.[40] The resulting prejudice was carefully minimized by the prosecution. The contents of the calls were not divulged to the jury.

We conclude that it was not error to permit testimony as to the anonymous threatening telephone calls.

---

[40]See Bracey vs. United States, D. C. Cir., 1944, 142 F. 2d 85, 89, cert. den., 322 U. S. 762; 4 Wigmore on Evidence, §1119; McCormick on Evidence, §49.

MISCELLANEOUS MATTERS OF EVIDENCE

Sica asserts as error the admission of testimony given by Leonard with reference to one Tom Stanley. Leonard testified that Stanley, a friend of Sica's, had called on him on occasions at about the time the indictments were handed down, seeking to persuade Leonard not to give testimony in appellants' trial. On two occasions Stanley had been accompanied by one Steve Calla. Stanley had stated to Leonard that Calla was a friend of Sica's and a convicted murderer. In Leonard's words, "He said Mr. Calla had been in the penitentiary in Cleveland for murder and I said 'Murder?' He said 'Yes, he beat them to death. He was a strong-arm man.'"

Sica contends that this testimony by Leonard of conversations had with Stanley constituted hearsay.

There can be no question but that the testimony was inadmissible for the purpose of establishing that what Stanley had said was true. It was not admitted for this purpose, however. Its purpose was to impeach and discredit Stanley as a witness.

Stanley had been called as a witness by Sica and had given testimony which, if believed, would have reflected upon the credibility of Leonard. The government sought to show bias and complicity upon Stanley's part; that even though he was not named as a co-conspirator, he was actively engaged in furthering the ends of the conspiracy.

Also, as in the case of the anonymous telephone threats to Leonard, the testimony had the purpose of showing Leonard's state of mind at a time when he was

charged with having corruptly proposed to appellants that for a consideration he would avoid the giving of testimony by leaving the country.

In both these respects the testimony was relevant and competent.[41] The question was not whether what Stanley said was true but whether Stanley had said it. This was made clear by the court in an admonition to the jury.

We find no error in the admission of this testimony.

Sica charges the government with misconduct in asking on cross-examination whether he had been convicted of the crime of bookmaking.

On direct examination Sica had testified with respect to his felony record and had admitted to two convictions. On cross-examination he had admitted a third. He was then asked whether in 1951 he had been convicted of a conspiracy to violate certain sections of the Penal Code of California relative to bookmaking. In colloquy following objection by Sica's counsel, it appeared that although the exemplified copy of judgment in the government's possession denominated the crime as a felony, a misdemeanor type of sentence had been imposed rendering the conviction one for misdemeanor.

Counsel for Sica then moved to strike the question and asked the court to instruct the jury to disregard it. This the court did to the express satisfaction of Sica's counsel, who conceded that the government apparently had acted in good faith. The following day Sica's counsel, reversing his judgment as to the good

[41] See 3 Wigmore on Evidence, §§948-949, 956, 960.

faith of the government, moved for mistrial. The motion was denied.

In our judgment, the court acted properly. We note that the question under attack never was answered. We have difficulty finding any prejudice. Sica had admitted three felony convictions including robbery. A jury suspicion that he may also have been convicted of a misdemeanor would not seem to add measurably in the credibility balance. Furthermore, the admonition of the judge was clear and commanding and in our judgment was an adequate remedy.

We conclude that it was not error or abuse of discretion to deny Sica's motion for mistrial.

Nesseth and one other witness, McCoy, were permitted over objection to testify to conversations had with Leonard, during which Leonard had recounted to them the threatening statements made to him by Carbo. Carbo asserts that this testimony was inadmissible as hearsay.

Leonard had already testified to the fact that these threats had been made. The testimony of Nesseth and McCoy was relevant proof of the state of mind of Leonard and of the effect which the threats had had upon him. It was competent evidence for this purpose and its admission was not error.

Appellants assert error in the admission of testimony by Leonard as to extortionate demands by Carbo not related to those here in issue. In our judgment, these were relevant in bearing upon intent and in showing Carbo's general plan or scheme to dominate the boxing field.[42]

---

[42]See Bush vs. United States, 9 Cir., 1959, 267 F. 2d 483, 489; 2 Wigmore on Evidence, §§300, 302, 304.

Carbo in his briefs has listed fifteen items of evidence which he contends were irrelevant and prejudicial. As to the bulk of these we do not regard them as irrelevant. To the extent that they were we find no prejudice. In any event, they did not form the basis of any assignment of error.

Appellants contend that evidence of the Daly-Leonard conversation should not have been admitted since that conversation did not serve to further the conspiracy. We think it obvious that it did.

CHARGE TO THE JURY

Rule 30, F.R.Cr.P., provides that any party may file requests for instructions and that "the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed."

Appellants filed extensive requests for instructions. The district court advised appellants that he rejected all requests in the forms submitted because of their prolixity and confusing draftmanship. He did not take issue with the propositions of law so presented, but refused to inform counsel as to the precise form his charge would take. Appellants assert that this is a violation of Rule 30 and reversible error.

Assuming arguendo that this constituted a violation of the rule as strictly read, we find no prejudice. The charge was proper, as we shall discuss. Appellants' arguments to the jury consumed four days and no suggestion has been given us as to how they might have been made more effective had the court fully and

precisely disclosed the substance of its charge. Therefore, we find no reversible error.[43]

In one respect appellants were placed at a disadvantage by virtue of the court's method of procedure: It was rendered difficult for them to comply with the requirement of Rule 30 that error in the giving of instructions may not be asserted unless objection is made before the jury retires to consider its verdict. The government here asserts that appellants are foreclosed by this provision of the rule from asserting error in the charge. In our judgment, this provision should not apply under such circumstances as we find here. We therefore proceed to a consideration of those errors assigned by appellants relative to the charge:

Appellant Gibson presented evidence of good character and assigns as error the district court's failure to instruct the jury that such evidence alone may create a reasonable doubt of guilt.

Upon this proposition of law the circuits are divided. The Tenth (joined by the Seventh) holds in accordance with Gibson's contention.[44] The remaining circuits do not require any more than that the jury be freely permitted to consider character evidence along with all other evidence upon the issue of guilt.[45] Such is the rule in this circuit.[46]

It is in the interpretation of Edgington vs. United States, 1896, 164 U. S. 361, that the circuits appear

---

[43]Watada vs. United States, 9 Cir., 1962, 301 F. 2d 869, 870.

[44]Peterson vs. United States, 10 Cir., 1959, 268 F. 2d 87.

[45]See footnote 3 of the Peterson case, supra (our footnote 44) at page 89.

[46]Kaspar vs. United States, 9 Cir., 1955, 225 F. 2d 275, 278-279.

to differ. There the Supreme Court stated, at page 366:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

In support of Gibson's position, a dictum in Michelson vs. United States, 1948, 335 U. S. 469, 475, referring to the privilege of introducing character evidence states:

> "This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. Edgington vs. United States, 164 U. S. 361."

Edgington, however, did not say or suggest that character evidence is so highly probative that it must, upon penalty of reversal, be singled out from the bulk of the testimony for special treatment. In Edgington the court was faced with an instruction which confined the jury's consideration of character evidence to cases where the evidence was in conflict or where

the rest of the evidence created a doubt of guilt. It held such limitation improper. It did not hold that the lack of limitation must be expressly pointed out to the jury.

Here the district court charged:

> "The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole."

The court went further, however, even approaching Gibson's proposed instruction. It gave as an example a Governor of the State of New York accused of robbery and, with repeated reference to this example, pointed out that "it would be very, very unlikely that a person of that reputation would be out as a stick-up man." It thus strongly suggested to the jury that it might find it improbable that a man of good reputation would commit a particular crime.[47]

Under the view of the law adopted by this court, the instructions upon this point were adequate.

Appellants claimed that the trial court failed to make a finding that the defendant's activities complained of affected interstate commerce so as to sustain federal jurisdiction. The judge instructed the jury that "if boxing matches are in fact televised and television is sent into other states, that brings it within ambit of interstate commerce." This was sufficient.[48]

---

[47]Compare Alverez vs. United States, 9 Cir., 1960, 282 F. 2d 435, 436.

[48]Hulahan vs. United States, 6 Cir., 1954, 214 F. 2d 441, 445-6, cert. den., 348 U. S. 856 (1954).

Appellants assert error in the instruction relative to the necessity for proof of overt acts in order to establish conspiracy under § 371. The court charged

> "It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid."

Appellants contend that it was error to tell the jury that an act done at the direction of the defendants or with their aid would satisfy the requirement.

We disagree. 18 U. S. C. §2(b) recognizes the principle of criminal agency in the federal law. It provides:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Furthermore, an instruction in accordance with appellants' views was given elsewhere in the charge. While appellants contend that this constitutes at best a conflict between instructions, we find no prejudice resulting. Since both Carbo and Palermo were found guilty on their substantive counts, the jury clearly found that overt acts had been committed by these defendants on both conspiracy counts.

Appellants assert that an instruction on aiding and abetting was confusing. We do not find it so. They assert that the court failed to instruct clearly on reasonable doubt. We regard the charge as perfectly

clear. They criticized the court's explanation of the division of functions between court and jury as tending to lull the jury into a sense that their responsibility was not final. We disagree. We find no merit in appellants' complaint that the court failed to define the term "underworld."

MISCELLANEOUS ASSIGNMENTS OF MISCONDUCT, VIOLATION OF DUE PROCESS AND OTHER MATTERS.

Appellants assert that they were denied due process because the prosecution permitted false evidence to go uncorrected.

Leonard was caught up in a falsehood with reference to his alleged solicitation of hush money from appellants. He testified that it was his wife and not he himself who had acted in this respect. A tape recording of a conversation between Leonard and Palermo, introduced by appellants, demonstrated the contrary. Appellants' position is that the government thus solicited false testimony and failed adequately to apprise the jury of the truth, relying on Napue vs. Illinois, 1959, 360 U. S. 264.

In that case denial of due process lay in the fact that the truth, known to the prosecution to be contrary to its witnesses' testimony, was never brought home to the jury. Here the truth, known to the defendants, was brought home to the jury in the most effective possible way. Furthermore: government counsel in argument to the jury conceded that Leonard was not testifying truthfully in this regard.

Defendants appear to be contending that when a government witness has been discredited in one respect,

the United States is obligated to disown him. We disagree. When the falsity of testimony is brought home to the jury, it remains the jury's function to determine to what extent that witness' testimony is otherwise worthy of belief.

Gibson contends that he was promised that his indictment would be dismissed. We find no substantial or credible evidence tending to show such a promise. In other respects, appellants protest that there was misconduct and deprivation of fair trial; alleged distortion of evidence by the government in closing argument; permitting Nesseth and McCoy to sit before the bar of the court during closing arguments so that government counsel might point them out; the court's interupting Carbo's counsel with questions during his argument. In none of these matters do we find merit.

Appellants contend that they have been denied due process and equal protection of the laws through denial of bail during trial. These contentions have already been made to this court in two prior appeals and there disposed of.[49]

Gibson, being of the colored race, asserts that unconstitutional discrimination occurred in the selection of the jury venire through systematic exclusion of Negroes. There was no proof of exclusion; only of the fact that out of fifty veniremen none was a Negro. Testimony of the clerk of the court as to the manner of selection effectively refuted this contention, and Gibson's offered proof of racial population statistics

[49]Carbo vs. United States, 9 Cir., 1961, 288 F. 2d 282; Carbo vs. United States, 9 Cir., 1961, 288 F. 2d 686, cert. den., 1961, 365 U. S. 861.

would not have been persuasive to the contrary. "Purposeful discrimination is not sustained by showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals." Akins v. Texas, 1945, 325 U. S. 398, 403.[50]

Appellants contend that the district court's method of handling challenges to the jury violated Rule 24(b) in that it did not assure the defendant their minimum number of challenges. The district judge required each side simultaneously to submit their challenges in writing to the clerk. The same juror might thus have been challenged by both sides. This is not improper.[51]

Gibson asserts that he was allowed only one challenge as to the three alternate jurors while Rule 24(c) grants him two challenges. This matter, however, was never presented to the district court and must be considered as waived.

Gibson contends that he was improperly denied severances. We disagree. The substantive counts in which Gibson was not charged still constituted overt acts attributable to him on the two conspiracy counts in which he was charged.

RULINGS OF THE SUCCESSOR JUDGE

Following trial and jury verdict and while motions for new trial by all appellants and a motion for acquittal by Appellant Dragna were pending before him, Judge Ernest A. Tolin, the trial judge, died. Judge

---

[50]See also Cassell vs. Texas, 1950, 339 U. S. 282, 286-7.

[51]Pointer vs. United States, 1894, 151 U. S. 396, 412; Hanson vs. United States, 9 Cir., 1959, 271 F. 2d 791, 792-3.

George H. Boldt was assigned to succeed him. A supplemental motion for new trial was made by all appellants under Rule 25, F.R.Cr.P.,[52] upon the ground that judicial duties in the case could not be properly performed by a successor judge. All motions were denied and Judge Boldt proceeded to impose sentence. This is assigned as abuse of discretion.

Appellants rely heavily upon dicta in Connelly v. United States, 8 Cir., 1957, 249 F. 2d 576, 580, cert. den., 356 U. S. 921 (1958), reh. den., 354 U. S. 964 (1958), where, in upholding a successor judge's decision that he could properly proceed, the court stated:

> "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character."

Appellants assert that this case is precisely of such character; that it depends almost in its entirety upon the testimony of Leonard and Nesseth, which was flatly

---

[52] "If by reason of absence from the district, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

contradicted by the appellants' witnesses in many material respects; that credibility of witnesses was of the essence of the case.

Accepting the statement in Connelly, we do not apprehend that where credibility of government witnesses is a serious issue, it must follow ipso facto that a new trial must be had. In Bennett vs. United States, 5 Cir., 1960, 285 F. 2d 567, cert. den., 366 U. S. 911 (1961), the court held that the successor judge acted properly in passing upon defendant's new trial motion and in sentencing him even though the facts were in dispute and the resolution of factual dispute by the jury was dependent upon demeanor.

Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence. We should be inclined to emphasize demeanor rather than credibility as the vital factor upon the question here presented. The inquiry then would seem to be as to how importantly demeanor appears to loom in making the necessary credibility determinations.

Here Judge Boldt, before ruling on the supplemental motions for new trial, spent more than three months in a careful study of the record. 7,500 pages of transcript were condensed by him into an abstract of 1,320 pages. He concluded, in his memorandum order:

> "On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed a most exhaustive con-

sideration of the record and analysis of authority are those relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars, was fully and convincingly corroborated."

This conclusion with respect to the substance of the corroborating evidence was reiterated from the bench at the time of imposing sentence. At that time Judge Boldt also expressed his conviction, based upon actions and words of Judge Tolin, that Judge Tolin "had not the slightest doubt of the guilt of any of the defendants or of the credibility of the principal witnesses."

In the exercise of his discretion Judge Boldt has, in our view, concerned himself with the vital question. He has concluded, after most careful and conscientious study, that the corroboration Leonard and Nesseth received from other convincing evidence placed the government's case safely beyond demeanor impeachment and that Judge Tolin himself had not been disturbed by questions of credibility. His determination in this latter respect is reinforced, to some extent at least, by Judge Tolin's charge to the jury. He warned them to discount the effect fear and the courtroom atmosphere might have on witnesses and emphasized the virtue of appraising testimony by the manner in which it successfully integrated with other evidence.

We do not find abuse of discretion in the action of Judge Boldt in proceeding as successor judge under Rule 25, to the completion of the judicial proceedings in the district court.

DECISION

As to Appellant Carbo, judgment affirmed.

As to Appellant Palermo, judgment affirmed.

As to Appellant Gibson, judgment affirmed.

As to Appellant Sica, judgment upon Counts 1 and 4 affirmed. Judgment on Count 5 reversed and the case remanded with instructions that judgment on this count be set aside.

As to Appellant Dragna, judgment reversed and the case remanded with instructions that judgment be entered for this defendant.

(Endorsed) Opinion Filed Feb. 13, 1963.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Paul John Carbo, et al., Appellants, vs. United States of America, Appellee. No. 17,762.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment in this Cause be, and hereby is affirmed as to appellants Carbo, Palermo and Gibson; that judgment as to appellant Sica is affirmed upon Counts 1 and 4 and on Count 5 judgment is reversed and the case remanded with instructions that judgment on this count be set aside.

Filed and entered February 13, 1963.

APPENDIX C.

Constitutional Provisions and Statutes Involved.

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

18 U. S. C. 371 (62 Stat. 701) provides in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof

in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U. S. C. 875(b) (62 Stat. 741) provides:

"(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

18 U. S. C. 1951 (62 Stat. 793) provides in pertinent part:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Rule 25, Federal Rules of Civil Prcoedure, provides:

"If by reason of * * * death * * * the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason he may in his discretion grant a new trial."

APPENDIX D.

Requested Instructions re Declarations of Alleged Co-Conspirators Outside the Presence of Defendants.

C. T. 644:

"There are a number of steps which you must follow in order to determine whether a defendant was a member of a conspiracy.

"First, you must find that there was a conspiracy;

"Second, you must consider all the evidence directly relating to a defendant in order to determine whether he was a member of that conspiracy. In determining whether he was a member or not you cannot consider any conversations which were made when he was not present. In determining whether he was a member, you cannot consider any acts done by others in his absence; and,

"Third, only if you find beyond a reasonable doubt that a conspiracy existed and that a defendant was a member of the conspiracy can you consider conversations of and acts done by co-defendants or alleged co-conspirators against an absent defendant.

"In other words, in considering whether or not a defendant on trial was a member of the conspiracy charged, you must do so without regard to, and independently of, the statements, acts, and declarations of others in his absence."

C. T. 646:

"The existence of the conspiracy, and each defendant's connection with it, must be established by independent proof, bases upon the reasonable inferences to be drawn from such defendant's own actions, his own conduct, his own declarations."

C. T. 647:

"You will recall that tesimony (sic) of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the tenative (sic) basis is destroyed and all such testimony must be ignored as to him.

"A defendant's connection with a conspiracy must be established beyond a reasonable doubt; accordingly, by his own conduct and his own statements or declarations."

C. T. 659:

"The existence of a conspiracy cannot be established against an alleged conspirator, by the testimony of an alleged co-conspirator as to his acts or declarations. The conspiracy must first be established by independent proof."

C. T. 660:

"Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with conspiracy."

C. T. 714:

". . .

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or

done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did." To the same effect: C. T. 705. C. T. 725:

"No evidence of an act or declaration of an alleged conspirator shall be binding upon or considered against any other alleged conspirator unless and until, independent and without the aid of such evidence, a conspiracy as alleged, and of which both such persons were members, has been proved to have been in existence at the time of such act or declaration; . . ."

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 18 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 145

TRUMAN GIBSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

WILLIAM R. MING, JR.,
123 W. Madison Street,
Chicago 2, Illinois,
LOREN MILLER,
2824 S. Western Avenue,
Los Angeles 18, California,
Attorneys for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes and Constitutional Provisions Involved	4
Statement	5
Reasons for Granting the Writ	21
Conclusion	34
Appendix A—Opinion	1a
Appendix B—Judgment	65a
Appendix C—Statutes and Constitutional Provisions	66a
Appendix D—Requested Instruction	69a

CITATIONS

Cases:

Berger v. United States, 295 U.S. 78	28
Brennan v. Grisso, 198 F. 2d 532	34
Broadcast Music Inc. v. Havana Madrid Restaurant Corp., 175 F. 2d 77	34
Carter v. State of Texas, 177 U.S. 442	22
Cassell v. State of Texas, 339 U.S. 282	21
Connelly v. United States, 249 F. 2d 576	30, 33
Direct Sales v. United States, 319 U.S. 703	29
Federal Deposit v. Siraco, 174 F. 2d 360	34

Glasser v. United States, 315 U.S. 60 29
Goldsby v. Harpole, 263 F. 2d 71 22
Goodman v. United States, 128 F. 2d 854 29
Guzman v. Pichirilo, 369 U.S. 698 34
Ingram v. United States, 360 U.S. 672 29
In re Linahan, 138 F. 2d 650 34
Johnson v. United States, 269 F. 2d 72 26
Krulewitch v. United States, 336 U.S. 440 29
Lanzetta v. United States, 306 U.S. 451 27
Marks v. United States, 260 F. 2d 377 28
Miller v. Pennsylvania Rd. Co., 161 F. Supp. 633 33
Muyres v. United States, 89 F. 2d 784 29
Napue v. State of Illinois, 360 U.S. 264 27
Norris v. Alabama, 294 U.S. 587 22
Pereira v. United States, 347 U.S. 1 29
Pierce v. United States, 86 F. 2d 949 28
Ross v. United States, 180 F. 2d 160 ..... 25, 28
Smith v. Dental Products Co., 168 F. 2d 516 34
Townsend v. Sain, ... U.S. 34
United States v. Crescent-Kelvan Co., 164 F. 2d 582 25
United States v. Dean, 246 F. 2d 335 24
United States v. Falcone, 109 F. 2d 579 29
United States v. Provoo, 215 F. 2d 531 24

Statutes:

United States Code Title 18, Sec. 243 21
United States Code, Title 18, Sec. 371 24
United States Code, Title 18, Sec. 875 24
United States Code, Title 18, Sec. 875(b) 4, 67a
United States Code, Title 18, Sec. 1951 ..... 67a
United States Code, Title 18, Sec. 3239 24

Rules:

Federal Rules of Criminal Procedure, Rule 25 30
Federal Rules of Criminal Procedure, Rule 30 25

Treatises:

4 Barron, Federal Practice & Procedure 246 26
7 Moore, Federal Practice (2d Ed. 1955) 1458 34

Constitution:

Constitution of the United States:
Article III 24
Fourth Amendment 4, 66a
Fifth Amendment 4, 66a
Sixth Amendment 4, 23, 66a

IN THE

Supreme Court of the United States

OCTOBER TERM; 1962

No.

TRUMAN GIBSON, JR.,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

Petitioner, Truman Gibson, Jr., respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a judgment of the United States District Court for the Southern District of California sentencing petitioner to two terms of five years imprisonment each, the sentences to be concurrent, and a fine of $10,000.00, and suspending the imposition of imprisonment only, and placing petitioner on probation for five years subject to the usual conditions and that the fine imposed be paid promptly.

OPINIONS BELOW.

Trial in the District Court was by jury.

The opinion of the court below, not yet reported, is appended hereto as Appendix A.

The judgment of the court below is appended hereto as Appendix B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed is February 13, 1963.

2. Petition for rehearing, timely filed, was denied on March 19, 1963. On application of petitioner and other co-defendants, Mr. Justice Douglas granted an extension of time within which to file a petition for certiorari to and including May 18, 1963.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C., 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Has a defendant been provided a fair trial where:

(a) He is denied an opportunity to show that there has been a systematic exclusion of Negroes from the trial jury;

(b) The judge refused even to consider his objections to irrelevant and incompetent testimony;

(c) Venue was never alleged;

(d) The judge did not apprise counsel of intended instructions prior to argument; refused to give proper instructions as to the effect of evidence of defendant's good character and prosecution's reliance on testimony it knew to be false and misleading;

(e) The judge permitted the prosecutor to make false, inflammatory and prejudicial statements concerning the defendant without even cautionary instructions and barred defense counsel from objecting to such statements;

(f) Over the objections of defendants, the judge admitted recorded conversations out of the presence of petitioner obtained by wire tapping and other surreptitious means, all aranged by local police officers as the prosecution well knew;

(g). Both the indictment and prosecution evidence included assertions of "underworld reputation" of other defendants and petitioner was compelled to answer, questions on cross examination concerning the "underworld" althqugh neither the prosecutor nor the judge ever defined the term?

2. May a conviction for conspiracy stand where, as to a defendant admittedly engaged in lawful business activities, the conviction is based entirely on conversations of alleged co-conspirators out of the presence of the defendant?

3. Can a successor judge fairly rule on post-trial motions in a lengthy trial where the testimony is in sharp conflict so that the principal issues can be resolved only by determining the credibility of witnesses including defendants who have testified?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Involved are the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; 18 U.S.C. §371; 18 U.S.C. §875(b); 18 U.S.C. §195; 18 U.S.C. §3239; and Rule 25, Federal Rules of Criminal Procedure. They are set out hereinafter as Appendix C except for 18 U.S.C. §3239 which is quoted in the argument.

STATEMENT OF THE CASE.

Petitioner, with four other defendants, was charged and found guilty under the two conspiracy counts of the ten count indictment involved here. The other eight counts were charges of substantive offenses against some of the other defendants.

The prosecution relied mainly on the testimony of Leonard Blakely, or as he is designated throughout the record, Jackie Leonard, and his partner Donald Paul Nesseth. Much of the evidence is in sharp conflict in that the credibility of the prosecution witnesses is seriously in issue.

In contrast the testimony of the petitioner is, in the main, uncontradicted. Truman K. Gibson, Jr., is and has been for many years a resident of the City of Chicago, County of Cook, State of Illinois and a citizen of the State of Illinois and the United States (R. Tr. 4289).[1] He is married and the father of one child. Following his graduation from the University of Chicago Law School in 1935 he was admitted to the bar of the State of Illinois in the same year and he continues to be a member of that bar (R. Tr. 4289). From 1935 to 1940 he engaged in the practice of law in the City of Chicago. In 1940 he was appointed Assistant Civilian Aide to the Secretary of War and in 1941 was appointed Civilian Aide to the Secretary of War charged with the duty and responsibility of advising the Secretary of War and the Assistant Sec-

[1] Reference is to the Reporter's Transcript of Proceedings.

retary of War on matters concerning Negro troops and Negro civilian personnel of the War Department (R. Tr. 4290). He continued in that post until the conclusion of the war with Japan in 1945 and for those services he was awarded the Medal for Merit. Thereafter he resumed the practice of law in the City of Chicago (R. Tr. 4290).

In 1949 Mr. Gibson became associated as Secretary with the then newly formed International Boxing Club of New York and the International Boxing Club of Illinois (R. Tr. 4289-4290). The business of the International Boxing Clubs was the promotion of fights in arenas owned by those promotional companies or affiliated corporations, and arrangement for the presentation of televised boxing bouts on Wednesday and Friday nights in those arenas and others throughout the United States (R. Tr. 4290). The producer of the Friday night fights telecast over the National Broadcasting Company television and radio networks was the Maxon Advertising Agency, a New York corporation not otherwise affiliated with the International Boxing Clubs. Mr. Gibson had no interest in the Maxon Agency. The American Broadcasting Company telecast the Wednesday night fights which were produced by Lester M. Malitz, Inc., and neither Mr. Gibson nor the International Boxing Clubs or any of their affiliates owned any stock in that producing company (R. Tr. 4297).

Each of the television contracts was a 52 week contract except for years in which Christmas or New Year's Day fell on Wednesday or Friday (R. Tr. 4298). Thus IBC was responsible for putting on at least 102 and probably 104 main events for television each year. For each of the main events promoted directly by IBC, about half of the annual total, those companies also were obliged to arrange sup-

porting cards of from three to five bouts. In more than ten years of operation, IBC never failed to produce a fight to meet its television obligations and the outcome of no such fight was ever predetermined or "fixed" (R. Tr. 4766, 4780).

The production costs to the sponsors of the Wednesday night fights ran from seventy-five to eighty thousand dollars per week, and as high as one hundred fifteen thousand dollars per week to the sponsors of the Friday night fights (R. Tr. 4307-4308). The International Boxing Clubs received a weekly fee from each series of approximately twenty thousand dollars per week to cover their costs of operation and arrangements with local promoters and fighters. Each contestant in a main event was paid a minimum of four thousand dollars, and each fighter in a semifinal bout was paid fifteen hundred dollars (R. Tr. 4307-4308). On telecast bouts originating outside New York or Chicago, the promoter in whose club the bout was held would receive a minimum of four thousand dollars in addition to the amounts paid to the fighters (R. Tr. 4308). Amounts paid for world championship matches and other outstanding contests were determined by negotiation between IBC, the producers, sponsors and networks (R. Tr. 3873). Advances by IBC to fighters, managers and other promoters was a characteristic of the business. The total of such advances outstanding at any time ranged from one hundred and seventy-five thousand dollars to two hundred and seventy-five thousand dollars (R. Tr. 5288).

The producers had the power and authority to approve or reject the site of scheduled fights both because of financial and technical considerations arising from the feasibility of telecasting and the cost and availability of necessary telephone lines and television equipment. Basically, fights

had to be arranged roughly eight weeks in advance and it was the responsibility of IBC to provide a substitute if for any reason a scheduled fight could not be held. (R. Tr. 3877-3878). All fights scheduled had to be approved by the state commission of the state in which the fight was held (R. Tr. 4324).

The stock of the International Boxing Club of New York was wholly owned by the Madison Square Garden Corporation (R. Tr. 4291). The stock of the International Boxing Club of Illinois was owned by Mr. Arthur M. Wirtz and Mr. James D. Norris, Chicago businessmen and owners of the Chicago Stadium, or corporations that they owned and controlled (R. Tr. 4291). Mr. Gibson owned no stock in either of the International Boxing Clubs and except for a few shares of Madison Square Garden Corporation stock which he owned for about six months in 1948, he never owned stock in any company affiliated with either the International Boxing Clubs, Chicago Stadium Corporation or the Madison Square Garden Corporation (R. Tr. 4290-4291).

The affairs of the International Boxing Club of New York were under the direction of its Board of Directors consisting of four persons, General John Reed Kilpatrick, long-time President of Madison Square Garden Corporation, Ned Irish, Executive Vice-President of Madison Square Garden Corporation, Mr. James D. Norris and Mr. Gibson (R. Tr. 4305). In 1958, Mr. Norris was replaced on that board by Mr. Francis Heazell, treasurer of the Knights of Columbus (R. Tr. 4305).

The International Boxing Club of Illinois was under the direction of a board of directors consisting of Mr. Wirtz, Mr. Norris and Mr. Gibson (R. Tr. 4305).

Mr. Gibson ran the Wednesday night fights from Chicago arranging most of the matches for television himself and supervising a matchmaker who arranged the supporting cards, and he was responsible for overseeing the New York operation where there was a matchmaker, assistant matchmaker and a managing director (R. Tr. 4298). A single main event would necessitate consideration of at least four or six opponents and managers and discussions with and about them (R. Tr. 4300). In the course of arranging these bouts Mr. Gibson carried on from four to five hundred conversations per year with fight managers and promoters throughout the country, mostly by telephone. He maintained an office at Madison Square Garden in New York where he spent about four days per week, and another office in the Chicago Stadium (R. Tr. 4299).

In performance of his duties Mr. Gibson was directly responsible to each of these boards and he reported daily to Mr. Norris who was a member of both boards and to Mr. Irish, then executive vice-president of Madison Square Garden (R. Tr. 4307).

In 1958, when Mr. Norris had a heart attack and resigned as president of the two International Boxing Clubs, the boards of directors of the two parent companies, the Chicago Stadium Company and the Madison Square Garden Corporation named Mr. Gibson as president (R. Tr. 5290). At that time the board of Madison Square Garden Corporation was composed of General John Reed Kilpatrick, chairman; Mr. Arthur M. Wirtz, vice-chairman; Mr. Ned Irish; Mr. Francis Heazell, treasurer of the Knights of Columbus; Mr. Daniel R. Topping, president of the New York Yankees; Mr. J. Arthur Friedlund, secretary and counsel for the New York Yankees; Mr. William H. Burke, vice-pres-

ident, Chicago Stadium Corporation; and Mr. August Bush (R, Tr. 5291, 5300). The board of directors of the Chicago Stadium Corporation was composed of Mr. Arthur M. Wirtz; his son William; Mr. James D. Norris; and Mr. Charles E. Dwyer (R. Tr. 5292).

In the performance of his duties, Mr. Gibson was responsible to these boards of directors respectively and he was required to make, and did make, reports to these directors at regular intervals; monthly in the case of the Madison Square Garden Corporation which was listed on the New York Stock Exchange and was therefore obliged to hold regular monthly meetings, and more frequently to Mr. Norris and Mr. Wirtz in connection with the activities of the Chicago Stadium Corporation and the International Boxing Club of Illinois (R. Tr. 5293). The books and records of all of these enterprises were regularly kept in the ordinary course of business, were regularly audited and the auditors made regular reports to the several boards (R. Tr. 4306).

Throughout his association with these enterprises Mr. Gibson was a salaried employee with no proprietary interest in them (R. Tr. 5287). Similarly, he never had any interest in any fighter or managerial contract with any fighter (R. Tr. 4326).

In addition to his business activities with these firms, Mr. Gibson maintained a private law office in Chicago and served as a member of the board of directors of Supreme Life Insurance Company of Chicago, and on the boards of various other business, social and philanthropic organizations. It stands uncontradicted that his character and reputation for truth and veracity are excellent (R. Tr. 5147, 5282, 5303, 5311).

In connection with his activities with boxing promotions Mr. Gibson met and dealt with hundreds of fight managers, fighters, promoters, matchmakers, sports writers, and state boxing commission officials and employees throughout the United States. Among these were Jack Leonard who when Mr. Gibson first met him was Assistant matchmaker at the Hollywood Legion Stadium in Los Angeles (R. Tr. 4294). Leonard subsequently became matchmaker at the same club (R. Tr. 4294). Similarly Mr. Gibson met and dealt with Don Nesseth, manager of record of Don Jordan, and Jackie McCoy, himself once a fighter and later a second, assistant matchmaker, and co-manager with Don Nesseth of Don Jordan (R. Tr. 4477-4478). Under the law of California a licensed matchmaker was prohibited from serving as manager of a fighter, but McCoy did, and Leonard regularly engaged in negotiation of matches for Don Jordan (R. Tr. 4476).

The Hollywood Legion Stadium owned by the American Legion Post of that city had been a well-known and popular boxing club for many years operated by the Post (R. Tr. 4320). Early in 1958, however, financial difficulties led the Hollywood Legion Post to decide to abandon its promotion of boxing (R. Tr. 4313-4314). At that time Jack Leonard approached Mr. Gibson and urged him to arrange to have the promotional enterprises with which he was connected take over the operation of the Hollywood Legion Stadium. Mr. Gibson informed Leonard that he and his associates were not interested in the direct promotion of boxing in the Hollywood Legion Stadium but he arranged for a telecast origination from the Stadium in order to help alleviate the financial difficulties (R. Tr. 4314).

Reluctant to see this popular, much-publicized club lost to the sport of boxing, Mr. Gibson discussed the matter with George Parnassus, long-time matchmaker of the Olympic Boxing Club, another Los Angeles fight promoter, and William Daly a long-time fight manager and an official of the Boxing Managers Guild who had close personal and business contacts with Mr. Edward Underwood, Chairman of the Board of the Hollywood Legion Post (R. Tr. 4315-4318). Other discussions with Jack Leonard and representatives of the California Athletic Commission followed, and in October, 1958 the International Boxing Clubs agreed to advance $28,000 for a lease deposit of $25,000 on the Hollywood Legion Stadium and working capital to a corporation to be formed by Jack Leonard with all of the stock to be owned by him. In addition, George Parnassus advanced $10,000 (R. Tr. 4329). That organization, designated the Hollywood Boxing and Wrestling Club, began to promote boxing in the Stadium under Leonard's direction and supervision in November, 1958 (R. Tr. 4330).

It was understood that Leonard was to rely upon the advice and assistance of Parnassus in promotional activities, and in order to conserve the limited funds of the enterprise, no major expenditures were to be made without notice to Mr. Gibson, although his signature was not required on checks drawn on the bank account of the Hollywood Boxing and Wrestling Club (R. Tr. 4332-4333). The money advanced by IBC was to be repaid from the promoter's share of television originations from the Hollywood Legion Stadium.

Almost immediately the Hollywood Boxing and Wrestling Club encountered financial difficulties and Leonard became actively involved in controversy with Parnassus (R. Tr. 4370). By early 1959, the situation had become

acute. The Legion Post was threatening to terminate the lease on the premises for nonpayment of rent and cancellation of the performance bond of the club, required by the California Commission, was threatened (R. Tr. 4595-4596). Leonard's promises to pledge the stock of the club to secure the advances had not been kept. Parnassus demanded repayment of his advances. Mr. Gibson made numerous calls to Los Angeles and several trips there in an effort to bolster the flagging operation. He arranged for Leonard to borrow $10,000 from one Ladell Tucker to repay Parnassus; he persuaded the Hollywood Legion Post to provide collateral security for the required performance bond by Leonard and he initiated discussions looking to a business combination of the Olympic Boxing Club and the Hollywood Boxing and Wrestling Club with its principals, Cal and Eileen Eaton, and Mr. Jamie K. Smith, one of the members of the California Athletic Commission (R. Tr. 4600-4606). Similarly, he asked William Daly to go to Los Angeles in May, 1959, to investigate the operation of the Hollywood Boxing and Wrestling Club and to determine what actions, if any, could be taken to improve its operations (R. Tr. 4660). At the same time Mr. Gibson pressed Leonard and his attorney, Mr. Kenneth Lynch, to execute the necessary documents to evidence the debt of the Hollywood Boxing and Wrestling Club for advances and to pledge the stock of the club as security as had been promised (R. Tr. 4668).

In December, 1958 Leonard raised with Mr. Gibson the possibility of a telecast of a fight to be held in Porterville, California, in connection with a sports day affair being planned in that community (R. Tr. 4553). Gibson undertook to make necessary inquiries of the producer as to the feasibility of a Porterville origination on or about

April 15, 1959 (R. Tr. 4560). In January, 1959 Leonard and Gibson discussed Gaspar Ortega and one of the Moyers from Portland, Oregon as possible contestants. Leonard was to promote the fight as an individual. He was to receive the customary four thousand dollar minimum promoter's fee plus two thousand dollars from the local sponsoring group, or a total of six thousand dollars (R. Tr. 4561).

Early in February, 1959, Leonard called Mr. Gibson in New York to inquire about the proposed Porterville fight. Mr. Gibson told Leonard that an answer had not yet been received from Mr. Malitz, the producer. Leonard said he was anxious to get the matter settled so that he could get an advance of eighteen hundred dollars on the promoter's fee to pay Palermo money Leonard said he owed him (R. Tr. 4563-4567). Gibson told Leonard he could not arrange for an advance on a Wednesday night from New York because that series was run from Chicago. A few days later Leonard called Mr. Gibson in Chicago and he agreed to make the requested advance against the proposed Porterville fight, and he drew the requisite voucher for issuance of a check to Leonard in the desired amount (R. Tr. 4568-4573).

Two days later Leonard called Mr. Gibson in Miami, Florida to inquire about the check. Gibson told him he assumed that it had been mailed and that Leonard should receive it in a day or two. Leonard then asked Gibson to so inform Ogilvie, the Hollywood Boxing and Wrestling Club bookkeeper, and to authorize him to issue a check of that organization to Leonard so he could cover a bank overdraft and replace the money when the Chicago Stadium check arrived. Gibson did so (R. Tr. 4573-4575).

Subsequently, Malitz refused to approve the Porterville fight because of the costs and difficulties of arranging a telecast there (R. Tr. 3892-3893). Both Leonard and Nesseth were angry and dissatisfied when Malitz communicated his decision to them in mid-March, 1959 (R. Tr. 3894-3895).

Meanwhile, as early as August, 1956, Mr. Gibson had sought to arrange a bout for the world's welterweight championship to be telecast on the Friday night series in early December with one of the managers of the then welterweight champion, Virgil Akins (R. Tr. 4443). He was managed by Bernie Glickman of Chicago and Eddie Yawitz of St. Louis. No opponent had been selected nor had the site of the bout been determined and, of course, no contracts had been signed (R. Tr. 4443). In October, however, the Olympic Boxing Club promoted a welterweight bout between Gaspar Ortega and Don Jordan at Long Beach, California. With the approval of the California Athletic Commission the bout was billed as an elimination for the right to fight for the welterweight championship (R. Tr. 4454). Don Jordan was the winner and the day after the fight Mr. Gibson began negotiations with Leonard, Nesseth and McCoy for an Akins-Jordan fight for the championship to be held on December 5, 1958, in Los Angeles, under the promotion of the Olympic Boxing Club (R. Tr. 4453). In the course of that conference Leonard told Mr. Gibson that Palermo, one of the other defendants, said there would be no fight unless he, Palermo, got a part of the manager's share of Jordan's purse (R. Tr. 4473).

Mr. Gibson had known Palermo through his activities in the boxing business as manager of a number of fighters including several world's champions (R. Tr. 4364-4365).

Mr. Gibson informed Leonard, Nesseth and McCoy that Palermo had nothing to do with the matter and that if they wanted a championship fight for Jordan they could have it (R. Tr. 4473). Later the same day Mr. Gibson met with Leonard, his lawyer Lynch, one James Ogilvie, an employee of the Hollywood Legion Stadium, and Parnassus to complete their plans for Leonard's organization of the Hollywood Boxing and Wrestling Club (R. Tr. 4432).

Jordan fought Akins and won the title from him. Under the terms of the original contract for the first Akins-Jordan fight, Akins was promised a rematch in the event that he was the loser, with the site of the bout to be St. Louis, Akins' home town (R. Tr. 4352).

In January, 1959 Jordan fought one Alvaro Guttirez in a non-title match under the promotion of the Olympic Boxing Club (R. Tr. 4338). The bout was not telecast. The IBC had no contract with the promotion. About that time Mr. Gibson learned that Don Nesseth was threatening to refuse to go through with the return bout with Akins. Another conference in Los Angeles between Leonard, Nesseth, McCoy and Gibson ensued (R. Tr. 4347-4348). By dint of agreeing to pay the transportation for six persons from Los Angeles to St. Louis for Nesseth and to make an advance of $2,500, Mr. Gibson persuaded Nesseth and Leonard to perform on their promise of a return match for Akins with Jordan (R. Tr. 4352).

That return bout was finally held in St. Louis on April 25, 1959, under the promotion of Sam Muchnick (R. Tr. 4613). By this time, pursuant to a court order, the International Boxing Clubs of New York and Illinois had been severed. Mr. Gibson had become head of the Boxing Divi-

sion of the Chicago Stadium Corporation and had terminated his connections with the New York promotional activities. The Chicago Stadium Corporation had no connection with the second Akins-Jordan fight. It was telecast by arrangement of Madison Square Garden with which, by then, Mr. Gibson had no connection (R. Tr. 4613).

A few days later Mr. Gibson learned that fighters had not been paid transportation in connection with a telecast fight at the Hollywood Legion Stadium and that there was a report that Nesseth had entered into an agreement with one Cus D'Amato, under the terms of which Nesseth was turning control of his fighters over to D'Amato. D'Amato was, and is, the manager of Floyd Patterson, heavyweight champion of the world (R. Tr. 4622). Though Mr. D'Amato had been indebted to the International Boxing Clubs for advances in the amount of $26,000 for some years he had consistently refused to permit Patterson to fight under the promotion of the International Boxing Clubs. Mr. Gibson called Leonard long distance about these matters and made arrangements to meet with Nesseth to discuss the matter in Chicago on May 2, 1959. Nesseth did not keep that engagement. Instead, on May 3, 1959, Leonard and Nesseth called Mr. Gibson by telephone and told him that they were being threatened by Palermo who was in Los Angeles and asked Mr. Gibson to make Palermo leave Los Angeles. Mr. Gibson told them that he had no control over Palermo and if they were being threatened by anyone they should "run, not walk" to the nearest law enforcement officers (R. Tr. 4635-4641).

About ten days later Mr. Gibson was subpoenaed to appear before the California Athletic Commission to testify

with respect to these matters. He appeared and did so testify (R. Tr. 4673).

Similarly, after the indictment involved here was returned, Mr. Gibson made a statement of several hundred pages to the United States Attorney in the Southern District of California (R. Tr. 4673-4674). Likewise he appeared before the Kefauver Committtee of the United States Senate in December, 1960, and testified at length concerning his activities in the boxing business.

Mr. Gibson never knew, saw or heard of Joseph Sica or Louis Tom Dragna prior to the return of this indictment (R. Tr. 4678-4679). Mr. Gibson had met Frank Carbo shortly after Mr. Gibson became associated with International Boxing Clubs. Over an eight or nine year period he had talked to him on only a few occasions usually by telephone and had not talked to him at all from about the spring of 1958 until after the hearing before the California Athletic Commission in May of 1959. (R. Tr. 4755-4757).

Neville Advertising Agency, a corporation in which Mr. Gibson had no interest but which was affiliated with the International Boxing Clubs made payments of approximately $40,000 to Mrs. Carbo between 1954 to 1957. These payments were made at the direction of Mr. Norris but Mr. Gibson knew of them. Likewise similar payments were made to Jack Kearns, an old-time fight manager. The payments were made to avoid antagonizing managers and fighters friendly to Carbo or Kearns. The payments were duly recorded, taxes were deducted, and no effort was made to conceal the fact that they were made (R. Tr. 4763-4767).

Mr. Gibson never made any threats of any kind, economically or otherwise, to Jack Leonard, Don Nesseth or anyone else (R. Tr. 4679). He never personally profited from any part of the purses of Don Jordan or any other fighter (R. Tr. 4677). He discontinued his connection with the boxing business in the fall of 1960 when the Boxing Division of the Chicago Stadium Corporation was dissolved.

The trial in this cause commenced on February 21, 1961, and continued from day to day before Judge Tolin, to May 30, 1961, when the jury returned verdicts of guilty as to all defendants on all counts (Tr.[2] IV, 951, 961).

Post-trial motions for a new trial (Tr. IV, 968-972) and for judgment of acquittal (Tr. IV, 973-974) were filed on behalf of Mr. Gibson on June 2, 1961, and were set for hearing on July 20, 1961 (Tr. IV, 980). In addition to being based on matters involved in the conduct of the trial these motions incorporated by reference the earlier two motions to dismiss including the issues of the motion to dismiss which the court had refused to hear on February 20, 1961. In accordance with leave of court obtained, memorandum and points of authority in support of these motions were filed on June 26, 1961 (Tr. IV, 1088-1108).

On June 11, 1961, Judge Tolin passed away. On June 19, 1961, a supplemental motion for new trial was filed on behalf of Mr. Gibson based on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending post-trial motions (Tr. IV, 988-997).

---

[2]Reference to the Transcript of Record of the Court.

On June 26, 1961, the Honorable George H. Boldt, United States District Judge for the Western District of Washington being generally assigned to sit in the Southern District of California was assigned this cause (Tr. IV, 1094). On July 24, 1961, Judge Boldt heard oral argument in support of the post-trial motions. On October 16, 1961, Judge Boldt denied the supplemental motion for new trial (Tr. IV, 1312-1314). On December 2, 1962, Judge Boldt imposed sentence (Tr. VI, 1500).

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

The Court of Appeals has sanctioned so gross a departure by the District Court from the accepted and usual course of judicial proceedings as to require exercise of this Court's power of supervision to remedy the denial of a fair trial to petitioner.

The record in this case is replete with actions by the trial court prejudicial to the petitioner. When taken together they amount to a gross denial of a fair trial to petitioner.

A.

On behalf of Mr. Gibson a motion to quash the venire was made on the ground that he is a Negro and that there was a systematic exclusion of Negroes from the jury (R. Tr. 75). That motion was summarily overruled on the basis of what the trial judge said he knew the facts to be and defense counsel was denied even an opportunity to make an effort of proof with respect to the matter. Instead the court itself called two witnesses to testify with respect to the method used to secure the venire (R. Tr. 90-96). Later (R. Tr. 4342-4346), the judge made a further statement as to his observations concerning service by Negroes on juries in the district.

Discrimination against a race by barring or limiting citizens of that race from participation of jury service has long been onerous to American thought and the Constitution and laws of the United States, Title 18 U.S.C., §243; *Cassell v. State of Texas*, 339 U.S. 282 (1950), and cases

there cited. If was error to deny the offer of proof of systematic exclusion of Negroes from the venire. *Carter* v. *Texas*, 177 U.S. 442 (1900); *Goldsby* v. *Harpole*, 263 F. 2d 71 (C.A. 5th, 1959). The efforts by the judge himself to answer the motion to quash the venire were themselves improper. *Norris* v. *Alabama*, 294 U.S. 587, 588 (1935).

B.

At the outset of the trial the court instructed counsel that it would rather entertain a motion to strike at the close of the government's case than to pass on objections with respect to evidence offered as the trial proceeded (R. Tr. 412-413). Thereafter it is clear from the record that though from time to time objections were made on behalf of Mr. Gibson with respect to the relevancy of testimony or other evidence offered by the prosecution, the court did not consider the questions as to relevancy to this individual defendant. At the close of the prosecution's case a detailed motion to strike was filed on behalf of Mr. Gibson (R. Tr. 766). That motion was summarily denied despite the fact that the prosecution had not shown that Mr. Gibson was a party to the conspiracy charged. Indeed, it is doubtful that the court even considered the question seriously.

By that time there had been admitted into evidence over the objections of counsel for Mr. Gibson testimony with respect to conversations outside his presence, conduct of other defendants not before known to him, and even testimony of conversations between persons not parties to the suit, particularly a recording of a conversation between one William Daly alleged to be a co-conspirator and not indicted, and Jack Leonard. There never was any evidence presented to show that Daly was a co-conspirator.

There was evidence, however, that Leonard, wired for sound by the Los Angeles Police Department, had gone to a hotel room occupied by Daly and proceeded to make a conversation with him. This the prosecution relied upon to corroborate Leonard's testimony in part. As a result there was the ridiculous and prejudicial situation that out-of-court statements by a prosecution witness, not made in the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence to corroborate the testimony of a prosecution witness who not only was available but who in fact testified at great length.

Similarly, recordings obtained by wire-tapping and other recordings of conversations outside the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence over his objection. The prejudice and harm to Mr. Gibson of admitting such evidence is demonstrated by the fact that after it retired, the jury, from this enormous record, asked for no reading of testimony and for no exhibits but the three recordings.

We adopt the argument of other defense counsel with respect to the impropriety of the admission of these recordings. We respectfully urge upon this Court, however, that the method used by the trial court in ruling on the admissibility of evidence in this case where both conspiracy and substantive counts were at issue was particularly erroneous and prejudicial to Mr. Gibson and, if no other reason were present, would require review of the decision below.

C.

It has been uniformly held that the requisite venue must be both alleged and approved by the Government, because the Sixth Amendment to the Constitution of the United States guarantees to the accused the absolute right

to a public trial by an impartial jury of the state and district wherein the offense is alleged to have been committed. *United States* v. *Dean*, 246 F. 2d 335 (8th Cir.); *United States* v. *Provoo*, 215 F. 2d 531 (2nd Cir.). Under Article Third of the Constitution of the United States, the Congress has the authority to define the jurisdiction, including venue, of the inferior Federal courts. From time to time, the Congress has exercised this authority by adoption of venue statutes of general applicability and by the adoption of venue statutes applicable with respect to particular offenses.

One such statute is applicable here. That is 18 U.S.C. §3239. It provides:

> "Any defendant indicted under sections 875, 876 or 877 of this title, with respect to communications originating in the United States, shall, upon motion duly made, be entitled as of right to be tried in the district in which the matter mailed or otherwise transmitted was first set in motion, in the mails or in commerce between the States."

Though Count V purports to be under both Sections 371 and 875 of Title 18 U.S.C., the gravamen of the offense charged is violation of Section 875 because without that section and without the charge that there was an agreement of the defendants to violate that section, there could be no violation of Section 371 because there would be no agreement to violate a law of the United States. Accordingly, Mr. Gibson is a "defendant indicted under Section 875".

Section 3239 specifically provides to any such defendant the absolute right to be tried in the district in which the interstate communication "was first set in motion". Thus, application of the customary requirement that venue must be alleged by the Government and proved, when applied

to this case, necessarily means that the Government must allege the place in which the interstate communication "was first set in motion".

Even a casual examination of Count Five shows that it does not satisfy this statutory requirement. Instead, in paragraph 4 of Count Five the Government has alleged only that, "to effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California *and in other places.*" (Emphasis supplied) The same paragraph continues by specifying five telephone calls between defendants Palermo and Carbo and Leonard. There is no allegation with respect to any telephone call by Mr. Gibson. More significantly, there is no allegation as to either of the termini of such telephone calls. Indeed, there is not even an allegation that these telephone calls were interstate communications.

The court below ignored Section 3239. It simply relied upon its own prior decision, which is in conflict with the cases cited above, to justify a conclusion that venue need not be pleaded.

D.

Though requested so to do the court did not apprise counsel of the instructions to be given prior to final argument. This, despite the explicit requirement of Rule 30 of the Federal Rules of Criminal Procedure. See *Ross v. United States*, 180 F. 2d 160 (C.A. 6th, 1950). This failure on the part of the court substantially prejudiced Mr. Gibson. See *Ross v. United States*, supra, and *United States v. Crescent-Kelvan Co.*, 164 F. 2d 582, 589 (C.A. 3rd 1948).

With respect to the instructions actually given or refused the court's action was equally prejudicial to Mr.

Gibson. On his behalf, and it was not contradicted, substantial evidence was adduced as to his good character and excellent reputation for truth and veracity. It is clear that he was entitled to an instruction as to the effect of such evidence. Such an instruction was requested, Defendant Gibson's Instruction F, which is set forth verbatim in Appendix D hereto. The trial judge indicated that he would give that instruction. Instead, he made a series of statements with respect to this matter which are also set forth verbatim in Appendix D.

We respectfully submit that those remarks would not satisfy the requirements with respect to an instruction as to character evidence. The statements made by trial judge completely omitted informing the jury that "an established reputation for good character alone may create a reasonable doubt as to the defendant Gibson". This aspect of the matter is not only of prime importance but has long been recognized as the minimum to which a defendant of good character is entitled. See 4 Barron, Federal Practice & Procedure, 246 and *Johnson* v. *United States*, 269 F. 2d 72, 74-75 (C.A. 10th 1959). We respectfully submit that in a case such as this where the credibility of the principal prosecution witness is attacked and where a defendant takes the stand and testifies at considerable length, and is subjected to long arduous cross examination as was Mr. Gibson and where evidence of good character is uncontradicted, to deny to him an instruction fairly and correctly apprising the jury of the effect of such character evidence is to prejudice and harm Mr. Gibson to such an extent that the conviction should be set aside.

Defense counsel contended that the prosecution had offered evidence, particularly testimony of Jack Leonard, which the prosecution knew was false and misleading in

material parts. It is well settled that if the prosecution so acts a conviction even based in part on such testimony cannot stand. See *Napue* v. *State of Illinois*, 360 U.S. 264 (1959), and cases there cited. At first when requested so to do the trial judge indicated that he would give such an instruction (R. Tr. 7434). Actually he refused so to do. Under these circumstances we respectfully submit Mr. Gibson was denied, to his prejudice, an instruction to which he had a right.

E.

We adopt the argument of counsel for other petitioners with respect to the use of the assertions of "underworld reputation" as to defendants Dragna and Sica. Obviously these assertions in the indictment and prosecution evidence were prejudicial to petitioner. Even worse was the fact that the trial judge permitted the prosecutor to cross examine petitioner about the "underworld" though the prosecutor flatly refused to define what he meant by the vague and indefinite term and refused to obey the court's order that he do so (R. Tr. 5023-5050). See *Lanzetta* v. *United States*, 306 U.S. 451 (1939).

Equally serious, on closing argument the trial judge emphatically forbade defense counsel to interrupt the prosecution even for the purpose of making objections (R. Tr. 6825-6826). On its rebuttal argument the prosecution raised for the first time, and argued at length, two matters which had not been referred to by the prosecution on its opening, though that had consumed more than seven hours, and had not been referred to by any defense counsel. When counsel for the petitioner, as to whom these matters referred, sought leave of court to reply, that leave was denied (R. Tr. 7588-7589).

Certainly the conduct of the prosecution contributed to the denial of a fair trial to Mr. Gibson. See: *Berger* v. *United States*, 295 U.S. 78, 88 (1935); *Marks* v. *United States*, 260 F. 2d 377, 383 (C.A. 10th 1958); *Ross* v. *United States*, 180 F. 2d 160 (C.A. 1960); *Pierce* v. *United States*, 86 F. 2d 949, 952 (C.A. 6th 1936).

F.

We adopt the arguments of counsel for other petitioners with respect to the use of recorded conversations obtained by wire tapping and by other surreptitious means. It is conceded that these means were arranged by Los Angeles Police officers and that the federal officers knew this to be the fact.

All over the country the bench, the bar, and the public are concerned with these invasions of privacy by electronic devices. In this case their use was particularly prejudicial in view of the fact that none of these recorded conversations was a conference to which this petitioner was a party.

G.

All of the above and foregoing matters taken together, we respectfully submit, constitute so gross a deviation and departure from the ordinary course of judicial procedure as to require review by this Court in order to provide a remedy to petitioner for the denial of a fair trial.

II.

The decision of the court below is so inconsistent with applicable decisions of this Court and the decisions of other Courts of Appeal with respect to the law of conspiracy as to require review of the decision below by this Court.

It is fundamental that a charge of conspiracy cannot be sustained unless it is proved beyond a reasonable doubt that there was an agreement by the particular defendants to commit the specified offense against the United States. *Ingram* v. *United States*, 360 U.S. 672, 677-678 (1959); *Pereira* v. *United States*, 347 U.S. 1, 12 (1953); *Krulewitch* v. *United States*, 336 U.S. 440, 443-444, 452-458 (1949). *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943).

To demonstrate a conspiracy to commit a particular substantive offense the prosecution must prove beyond a reasonable doubt at least the extent of criminal intent which would have to have been shown to demonstrate the commission of the substantive offense itself. *Ingram* v. *United States*, supra.

Even if the prosecution proved beyond a reasonable doubt knowledge on the part of a defendant of wrongdoing by others or an agreement between others to commit an offense, that would not be sufficient to convict that defendant as a party to any such agreement. *Ingram* v. *United States*, supra; *Krulewitch* v *United States*, supra; *Goodman* v. *United States*, 128 F. 2d 854 (C.A 9th 1942); *United States* v. *Falcone*, 109 F. 2d 579 (C.A. 2d 1940); *Muyres* v. *United States*, 89 F. 2d 784 (C.A. 9th 1937).

The court below ignored those decisions. Moreover, it flatly refused to apply *Glasser* v. *U. S.*, 315 U.S. 60, 75 (1942), which prohibits the use of declarations of co-conspirators to prove an alleged illegal agreement. Indeed,

so far as this petitioner is concerned the court below went so far as to *imply* that a non-indicted co-conspirator spoke for this petitioner when there was no evidence whatsoever that he did so.

Under these circumstances we respectfully submit the writ of certiorari should issue to review the decision of the court below because it is grossly in conflict with the applicable decisions of this Court and the decisions of other courts of appeal.

III.

In construing and applying Rule 25 the court below has decided a question of federal law which has not been, but should be, settled by this Court.

The late Honorable Ernest A. Tolin conducted all of the proceedings in this cause until the time of his death on or about June 11, 1961. At that time the verdict had been returned and post-trial motions for new trial and judgment of acquittal had been filed.

Thereafter Mr. Gibson, and other defendants, filed a supplemental motion for new trial on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending motions (Tr. 988). Those motions were all denied by the successor judge, the Honorable George H. Boldt, on October 16, 1961, (Tr. 1342). Rule 25 of the Federal Rules of Criminal Procedure provides for a successor judge, but "if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason he may in his discretion grant a new trial". The determination by a successor judge that he can perform the duties required after a verdict is reviewable on appeal, *Connelly* v. *United States*, 249 F. 2d 576 (C.A. 6th 1957).

We respectfully submit that the determination by Judge Boldt in this case was an abuse of sound judicial discretion because of the fact and circumstances of this trial particularly with respect to Mr. Gibson.

The trial in this case began on February 21, 1961, and there were hearings before the Court on more than sixty days prior to the verdicts. The Reporter's Transcript of Proceedings in this cause totals more than seventy-five hundred pages. In the course of the trial approximately ninety witnesses testified. Thirty-seven of these were offered by the prosecution on its direct case. More than thirty witnesses, including this defendant and three of the other defendants, testified for the defense. More than twenty witnesses were tendered by the prosecution in rebuttal. Approximately three hundred fifteen exhibits were marked and about three hundred of these were received in evidence.

Included among the exhibits admitted were a number of recordings of conversations alleged to have been had between various persons by telephone and otherwise. Mr. Gibson did not participate in any of these conversations. All of the recordings introduced by the prosecution were admitted over his objections. Six of these recordings were played in open court before the judge and jury. Three recordings offered by the prosecution including one not previously played were played for the jury in open court after it had retired to consider its verdicts. The playing of these recordings and the attendant proceedings both in and out of the presence of the jury took up at least twenty per cent of the time devoted to the trial. The Reporter's Transcript of Proceedings, however, contains no transcript of any of these recordings because it was the opinion of the trial judge that the reporter could not fairly transcribe from the reproduction of these record-

ings in the courtroom. Though what purported to be transcripts of some of the recordings were marked as exhibits, Judge Tolin refused to admit these purported transcripts in evidence in the absence of agreement by all counsel that such transcripts were correct. There was no such agreement.

No judgment had been entered in this cause by Judge Tolin prior to his death. Even more important, the post-verdict motions were pending. Those motions raised substantial and complex questions of both law and fact. Mr. Gibson contended that the evidence was not sufficient to support the verdicts as to him. There is a sharp conflict in the evidence in this cause with respect to Counts I and V of the indictment which are the only counts charging Mr. Gibson. In this connection it is significant that the court below reversed the conviction of Dragna, the only other defendant charged only in Counts I and V and reversed the conviction of Sica as to Count V.

Over repeated objections, prosecution evidence was admitted which had no application to Mr. Gibson and which was prejudicial and harmful to him. There is a substantial question as to the credibility of the principal witness for the prosecution, Leonard Blakely, alias Jack Leonard, and some of the matters derogatory to the credibility of this witness and another prosecution witness, Don Nesseth, were conceded and admitted by the prosecution. Even more important is the credibility of Mr. Gibson as a witness in light of the nature of the charges against him, the length and nature of his direct testimony and the cross examination of him, and the uncontradicted evidence of his good character. It is respectfully submitted that one who has not observed the witnesses could not fairly resolve these issues.

The pending motions raised other issues which it is respectfully urged could not be fairly resolved by one who did not have the "feel of the case." These range from the sufficiency of the indictment, the question of venue and the propriety of a joint trial through, but not limited to, the legality of the method of jury selection, the propriety of innumerable rulings on the admissibility of evidence, the propriety of the conduct of the prosecution before and during the trial and particularly in closing argument, on to the sufficiency of the instructions given and refused.

More delicate and more difficult to state is a question which arises from the medical history of Judge Tolin. His untimely demise immediately following a long and arduous trial and his long history of serious cardiac difficulties with the inevitable attending necessity for medication and restricted activities suggests that though he was an able and experienced judge, in the conduct of this trial he may have been unable to proceed with the required fairness and impartiality. Review of his conduct of this trial under these circumstances by a successor judge, it is respectfully submitted, is not likely to serve the interests of justice when "manifestly, the judge to whom such a proceeding is assigned because of the death of the trial judge, finds himself in a position of considerable delicacy, as he has to perform the somewhat invidious function of reviewing the rulings of a judge of co-ordinate jurisdiction. * * *." (*Miller* v. *Pennsylvania Railroad Co.*, 161 F. Supp. 633, 636 (D.C.D.C. 1960).

Where there is a substantial conflict in the evidence and the credibility of prosecution witnesses is a serious issue, a successor judge cannot provide a fair trial to a defendant in passing on post-verdict motions and in rendering sentence. *Connelly* v. *United States*, 249 F. 2d 576, 580-581

(C.A. 8th, 1957); *Brennan* v. *Crisco*, 198 F. 2d 532, 533 (C.A.D.C., 1952); *Federal Deposit Ins. Corp.* v. *Siraco*, 174 F. 2d 360, 363-4 (C.A. 2d, 1949); *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (C.A. 2d, 1949); *Smith* v. *Dental Products Co.*, 168 F. 2d 516, 519 (C.A. 7th, 1948); *In re Linahan*, 138 F. 2d 650, 653-4 (C.A. 2d, 1943); 7 Moore Federal Practice (2d Ed. 1955) 1458.

This Court has only this term reiterated its view of the importance of demeanor in determining credibility of witnesses in *Townsend* v. *Sain*, No. 8, October Term, 1962, decided March 18, 1963, ... U.S. ..... To the same effect is *Guzman* v. *Pichirilo*, 369 U.S. 698.

This Court has not hitherto construed or applied Rule 25 and we respectfully submit that this is a matter of such importance as to require this Court to give guidance to the lower federal courts in this important matter.

CONCLUSION.

In light of all of the above and foregoing we respectfully request this Court to issue its writ of certiorari to review the decision of the court below.

Respectfully submitted,

WILLIAM R. MING, JR.,
LOREN MILLER,
Attorneys for Petitioner.

Dated: May 16, 1963.

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

PAUL JOHN CARBO, FRANK PALERMO, JOSEPH SICA, LOUIS TOM DRAGNA, and TRUMAN K. GIBSON, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No: 17,762
Feb. 13, 1963

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

Before: BARNES, HAMLIN and MERRILL, Circuit Judges
MERRILL, Circuit Judge

Appellants stand convicted of extortion affecting commerce and conspiracy to extort in violation of 18 U.S.C. §1951, commonly known as the Hobbs Act,[1] of the inter-

---

[1] "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

• • • • • • •

(2) The term 'extortion' means the obtaining of prop-

state transmission of threats and conspiracy to transmit in violation of 18 U.S.C. §875(b),[2] and of conspiracy to commit an offense against the United States under 18 U.S.C. §371.[3] They were variously charged in ten counts of an indictment by the Grand Jury of the Southern District of California, Central Division. On May 30, 1961, following trial, they were found guilty by jury verdict and on December 2, 1961, were duly sentenced. They have appealed from their several judgments of conviction.

---

erty from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

[2]"(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transm. s in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

[3]"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

(Opinion of the United States Court of Appeals)

The case involves in general the business of professional boxing and fight promotion and, more specifically, the efforts of appellants to secure managerial control of Don Jordan, a welterweight fighter, by bringing pressure to bear on his manager, Donald Nesseth. These efforts were prompted, according to the theory of the United States as expressed it its brief, by the fact that "* * * 'control' of champions and top contenders was the only significant profit factor in the operation of the boxing business. The evidence shows that 'control' was effected and maintained through matching controlled fighters with one another and that the technique for obtaining this control was to capture the fight manager through use of economic and, as a last resort, physical coercion."

Since the contentions on appeal relate importantly to the sufficiency of the evidence, the facts must be dealt with at some length.

THE FACTUAL BACKGROUND

The matching of controlled fighters has already been considered by the federal courts in proceedings brought against the International Boxing Clubs of New York and Illinois for violation of the Sherman Act. International Boxing Clubs vs. United States, 1959, 358 U.S. 242, affirming United States vs. International Boxing Clubs, S.D.N.Y., 1957, 150 F. Supp. 397. Since these proceedings figure directly in the background of the case at bar, a reference to the facts there established is helpful. The Supreme Court, at pages 245-246 recites:

> "The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe

Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtaining from each of the four leading contenders exclusive promotion rights including rights to radio, television and movie revenues. Upon securing these exclusive contracts Louis assigned them to the appellant International Boxing Club, Illinois * * *."

The opinion then recites that Norris and Wirtz organized the International Boxing Club of New York and for it acquired control of Madison Square Garden and entered into other contracts. The opinion then states, at pages 247-248:

"This series of agreements consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship divisions, i.e., heavyweight, middleweight, and welterweight. Not satisfied with this temporary control, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, for a period of from three to five years. Over the facilities for the staging of contests appellants exercised like control, owning or managing the 'key' arenas and stadia in the Nation.

* * * * *

"The effect of the conspiracy is obvious. Using the facilities of I.B.C., Illinois, and I.B.C., New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a

contender thereafter was clear, i.e., to sign with appellants or not to fight."

Later, at page 254, the opinion states:

"This illegal activity gave appellants an odorous monopoly background which was known and still feared in the boxing world."

By the decree Norris and Wirtz were directed to divest themselves of their stock holdings in Madison Square Garden. The boxing clubs were ordered dissolved. All exclusive agreements for the promotion of boxing events were banned.

Appellant Truman Gibson, a Chicago attorney, represented Joe Louis in 1949 at the outset of the sequence of events described in the Supreme Court opinion and from their inception was active in the affairs of the International Boxing Clubs. In 1958 he was made president of both clubs. It is the government's position that as antitrust pressure was applied to the clubs they ceased their practice of requiring that exclusive management be granted to the clubs; that the practice of securing exclusive management agreements was continued by Appellants Carbo and Palermo and that Appellant Gibson, with full knowledge of Carbo's practices and methods of operation, continued, through his dealings with Carbo and for their mutual advantage to match Carbo-controlled fighters.

Carbo, with a background of underworld association, emerges as the leader of the conspirators. Gibson's first contact with him came shortly after the boxing clubs were organized sometime in 1950. From time to time between 1954 and 1957, Gibson caused payments amounting to approximately $40,000.00 to be made to Carbo by the boxing clubs through the device of placing Carbo's wife, Viola Masters, on the clubs' payrolls for fictitious employment.

Payment was explained by Gibson as being for the purpose of securing Carbo's good will and of preventing fighters or managers with whom Carbo had "influence" from becoming antagonized or alienated. In investigations conducted by the United States Senate, Gibson had explained why Carbo's wife had been employed rather than Carbo himself: "Because it looked a little bit better on our records, not ever considering the possibility of being called before a senate investigative committee, to have Viola Masters down instead of Frank Carbo." Both before the Senate committee and in trial below, Gibson acknowledged that in their operations the boxing clubs had had dealings with the underworld. This practice was resorted to in order "to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements." Gibson testified that the boxing clubs would use "everyone" they could to prevent fixed fights and that in "everyone" he included the underworld. On redirect examination Gibson was asked whether it was "the policy of the International Boxing Club or any other organization with which you were connected in the fight business to use force or violence or threats of force and violence * * *" to which Gibson replied "No indeed." On recross examination he was asked: "Of course, Mr. Gibson, when you used various people to achieve your ends you didn't know what those other people were doing on your behalf, did you?" To which Gibson answered: "Not completely, no."

The district court judgment in the antitrust action was rendered in March, 1957. Commencing in the summer of 1958 Gibson sought to extend the influence of the boxing clubs to the west coast. At that time there were two exhibition halls in Los Angeles suitable for the staging of boxing contests: the Hollywood Legion Stadium and the Olympic Auditorium. Gibson moved to secure control of both.

At this time he was in charge of promoting weekly the two nationally televised boxing contests: Wednesday night on ABC and Friday night on NBC. At least $180,000.00 a week was received by the boxing clubs in connection with these promotions. The possibility of sharing in the television profits provided an incentive to deal with Gibson. A new organization known as the "Hollywood Boxing and Wrestling Club" was established by Gibson and his associates to lease the Hollywood Legion Stadium. The International Boxing Clubs lent $28,000.00 to this organization to commence operation. Named as president of the new organization and acting as its promoter and matchmaker was Leonard Blakely, known professionally (and hereinafter referred to) as "Jackie Leonard." Leonard's vulnerability to economic pressure from Gibson is apparent. Not only was his club indebted to Gibson's organizations but his future was largely dependent on Gibson's good will with respect to participation in the televising of contests.

In the fall of 1951, Virgil Akins, a Carbo-controlled fighter, was welterweight champion. A promising contender was Don Jordan, who was managed by Donald Nesseth. Nesseth had been making repeated efforts to obtain fights for Jordan on national television and had enlisted Leonard's support in this respect. With Gibson's assistance Leonard secured one such fight at the Legion Stadium with the fighter then ranked as the number one contender in the welterweight ranks. Jordan won this and two other televised bouts and became the leading contender for the title. A fourth match at the Olympic Auditorium in Los Angeles was arranged for October 22, 1958, and Gibson assured Nesseth that Akins, the champion, had agreed to defend his title against the winner of the bout. Jordan won.

The sequence of events which are now related are based in large part on the testimony of Jackie Leonard and in many respects are vigorously denied.

On October 23, 1958, while Nesseth, Leonard and Gibson, at the Olympic Auditorium, were discussing the anticipated championship fight between Akins and Jordan, Gibson received a telephone call from Appellant Palermo. Gibson spoke briefly and then handed the phone to Leonard, saying that "Blinky" wanted to speak to him. Palermo told Leonard, "We are in f[illegible] half the fighter [fifty per cent of the manager's share] or there won't be any fight." Leonard protested that he had never heard of any such proposition before, and Palermo, upon learning that Gibson had not explained the situation, told him to talk it over with Gibson and call him back. When Leonard recounted the conversation, Nesseth flatly refused. Gibson explained that Carbo and Palermo controlled Akins and apologized for not having informed him of Palermo's demands earlier.

Gibson, Nesseth and Leonard met later in the day at Gibson's hotel for purposes of privacy and continued to discuss Palermo's demands. According to Leonard's testimony, Gibson said: "You know how Carbo and Blinky [Palermo] are * * *. They want all of everything before you can get a welterweight title fight * * * [but] go along with it. It has been done before. That is the way the welterweight and lightweight title has been worked since Carbo and Blinky got into the picture." Gibson proposed that Nesseth should tell Palermo that he agreed, and assured Nesseth and Leonard that he, Gibson, would straighten things out later in Chicago. Nesseth refused. He feared violent retaliation if Carbo and Palermo, falsely informed that Nesseth had yielded, should later discover that he had no intention of surrendering an interest in Jordan. He

testified. "* * * we reminded Truman [Gibson] that these weren't kids that we were talking to, and that he couldn't do very much protecting from 2,500 miles away, if they decided to start playing rough, and Truman scoffed at that and said that went out with high-buttoned shoes, that there wouldn't be any of that, and not to worry, that he would straighten it out." Gibson finally persuaded Leonard to call Palermo and to tell him the arrangement was satisfactory. This Leonard did, learning from Palermo that Gibson had already advised him that everything was all right.

On December 5 Jordan defeated Akins and became the welterweight champion of the world. The fight arrangements called for a re-match if Jordan won, with Palermo's share of both fights being payable after the re-match. Jordan won the re-match.

Between these two matches, Jordan on January 22, 1959, fought a match with another fighter, Gutierrez. Leonard asked Gibson who was to pay Palermo's share of that fight and Gibson said that if necessary he would pay it himself.

After the Gutierrez fight, when the money was slow in coming, Palermo telephoned Leonard, screamed and shouted that he was being stalled and double-crossed. Leonard tried to pacify him by telling him that he had seen Gibson that day and that the money would be sent. Palermo said he didn't want to hear anything about Gibson; that he was holding Leonard and Nesseth responsible and that Leonard was expected to handle Nesseth. Carbo then took the phone from Palermo and, according to Leonard's testimony, "He said, 'You son-of-a-bitching double-crosser.' He said, 'You are no good,' and he says, 'Your word is no good. Nothing is no good about you.' He said, 'Just because you are 2,000

miles away, that is no sign I can't have you taken care of.' He said, 'I have got plenty of friends out there to take care of punks like you.' He said, 'The money had better be in.' * * * I was trying to get a word in edgewise, to tell him the money would be sent that day. He wouldn't let me say anything, he was just cursing and hollering at me and saying there would be somebody out here to take care of me, and if that money wasn't there right away somebody would be looking me up."

Leonard was badly frightened by the conversation. After hanging up he turned to Nesseth, who had been standing next to the telephone booth, and told him everything that had been said. Nesseth noticed that Leonard was "shaken up, nervous."

Leonard later, by arrangement with Gibson, sent his personal check for $1,725.00 to Claire Cori (Palermo's wife) and was reimbursed by Gibson.

During this period of time Palermo and Gibson both began to express an interest in matching Jordan with Sugar Hart, another Carbo-controlled welterweight. Nesseth was not interested. The match would be a hard one and Nesseth felt easier matches would be more profitable and less risky.

The Jordan-Akins re-match was held in St. Louis on April 24, 1959. Palermo immediately demanded his share from Nesseth. Nesseth flatly refused to pay anything and explained that he had never consented to surrender an interest in Jordan and the circumstances under which Leonard and Gibson had stated the contrary to Palermo. Palermo's final comment was that "'The Man' isn't going to like this." Palermo called Leonard and, according to Leonard's testimony: "He told me I would be hearing from him right away, I better do something to straighten this

mess out or I was going to get in a lot of trouble with the people back East."

On April 28 Nesseth and Leonard were in Leonard's office when a call came from Carbo. Leonard testified: "* * * the voice said, 'Hello, hello, hello. You know who this is?' I says, 'Yeah, I know who this is.' And he says, 'You're a no good'—and he used some vulgar language and called me a double-crosser and told me that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead, and he called me another S.B. and different names, real bad names, 'double-crosser,' and he says, 'We are going to meet at the crossroads,' he says, 'You will never get away with it. I have had that title 25 years and no punks like you are going to take it away from me,' and he repeated that statement, he says, 'When I mean get you, you are going to be dead,' he said, 'We will have somebody out there to take care of you.'"

Nesseth testified: "What I heard from Leonard's end of the conversation, there wasn't very much conversation on his part. One or two times he stammered and said, 'You shouldn't say those things.' But the call, I would say it was very one-sided, and I did notice and observe that Leonard turned about the color of your shirt during the course of that conversation, and when the phone call was over and he hung up the phone he sat there just for a second and he got up and ran across the hall to the ladies' room, which we used during the daytime as a men's room, and he vomited. I have never seen anybody any more shaken up than he was at that time."

A few minutes later a telephone call came from Palermo. Leonard testified: "And he said, I was a double-crosser and I was no good and he was coming to the coast and he

was going to see some people and they were going to see me. And I told him there was no good to come, and I was mad, I was very mad, and I hung up on Blinky."

Later, at Leonard's home, he received another call from Palermo which he described as follows: "He wanted to know if I cooled off yet and said, 'Jesus, there is no use being like that.' He says, 'After all, maybe the guy shouldn't have called like that, but' he said he figures he had a right to, 'they have had that account a long time and you people out there are double-crossing him.' He said, 'Now, we might as well be like gentlemen and not be mad,' and he says, 'I will be out there and talk to you.' I said, 'There is no use of coming out here, I am fed up with all of you,' and I told him he would have to see Nesseth and he said, 'I can't see Nesseth unless he will sit down and talk to me.' And I said, 'You will have to take care of that, there is nothing I can do about it. Nesseth doesn't want to talk to any of you and if you want to talk with him, you will have to make your own contact with him.' With that he said, 'Well, I will be out there in a few days and we are going to look you up.'"

On April 30 Gibson, who had been notified by Leonard of the threatening calls, telephoned Leonard and offered to pump additional capital into the Hollywood Club if Leonard would persuade Nesseth to agree to a Hart fight. On the same day Palermo arrived in Chicago from the east and stayed at the Bismarck Hotel (owned by Norris and Wirtz) at the expense of the Boxing Clubs. On May 1 he met with Gibson and Hart's manager in the lobby of the hotel and thereafter left for Los Angeles.

On May 2 Leonard had a telephone call from Palermo summoning him to a late night meeting at a Los Angeles hotel. He entered the hotel to find Palermo in company

with Appellant Sica. Describing his reaction to Sica's presence in company with Palermo, Leonard testified: "Well, the minute I seen him I remembered what Carbo had told me before about somebody on the west coast taking care of me and for once I was scared, when I seen him. * * * Well, by reputation I had always known of Joe Sica as an underworld man and a strong-arm man."

In their conversation, according to Leonard, Sica stated: "He says, 'Look, Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt. Wouldn't you rather go grab him by the neck and straighten him out, than for me to go back tell "The Gray"? You try it, you are all right, but it is Nesseth that is no good.' 'The way it is now,' he says, 'you and Blinky have both got your necks in a sling,' and he said, 'Something has got to be straightened out.' He said, 'If you have to, go out and beat the hell out of Nesseth. If you need any help we will go with you and help you and drag him out of bed.' "

Also, referring to Palermo, Leonard stated: "Well, Blinky said, 'That is the only answer to the whole problem,' was for me to convince Nesseth to fight Sugar Hart and that that would straighten things out, as far as Carbo was concerned. And Sica agreed there, too. He said that I had my head in a noose and that was the only way I was going to get the thing straightened out, was to grab hold of Nesseth and make him take the fight with Sugar Hart."

The following day Nesseth called Gibson to complain of the threats that had been received. Gibson disclaimed responsibility but, according to Nesseth, "Truman said, 'Well, all the pressure can be relieved and you can also do your own Jackie Leonard a favor by saving his Club, if you will just agree to fight Sugar Hart.' And I told him they could forget that, because I had better things in mind and I

wasn't going to fight Sugar Hart. We must have talked for probably 15 minutes and Truman agreed that he would call Norris and see what he could do about getting these people out of town."

On May 4, while Nesseth and Leonard were in Leonard's office, Palermo appeared and, shortly thereafter, Appellant Dragna. Nesseth immediately left the room. Palermo, in Leonard's presence, then explained the problem to Dragna and asked what Dragna thought of it. According to Leonard: "Dragna says, 'Well, you are wrong, Jackie. You are dealing with big people and your word should be your bond.' He says, 'After all, if your word is no good, then you are no good in this game. Everything is dealt—you are dealing with real nice people and big people, and if your word is no good you are no good in this game.'"

Dragna inquired about Nesseth; whether he did not live out his way in West Covina and again whether he did not have a wife and child. Later, according to Leonard, Palermo stated: "'Well, we have to make this Hart fight. At least, if I can go back and tell "The Old Man"'—meaning Frank Carbo—'tell him I have the Hart fight, that will take a lot of pressure off. I can tell him you tried and I tried and at least we have something accomplished.' He said, 'I am going to leave,' and he said, 'I want you to make sure things are taken care of.' Dragna told me, he says, 'You are right in the middle of this thing, Jack.' And he said, 'You better try to get it straightened out or,' he says, 'you can be in a lot of trouble.'"

As with Sica, Leonard understood that Dragna was connected with the underworld and associated his appearance with Carbo's threat. Nesseth also testified that he understood both Sica and Dragna were connected with the under-

world. Dragna's appearance so upset him that he immediately sought and obtained police protection.

On May 5 an induction coil connected with a tape recording machine was placed beside Leonard's home telephone, with his consent, by the Los Angeles Police, and his office was equipped with a concealed microphone.

The following day Sica and Palermo called on Leonard and Nesseth at Leonard's office in an effort to persuade Nesseth to agree to a fight with Sugar Hart. The visitors received no satisfaction. As Sica was leaving, he leaned over Leonard and, according to Leonard, whispered in his ear: "Jackie, you are it." Nesseth confirmed that Sica had whispered in Leonard's ear as he was leaving.

On May 7, in telephone conversation with Gibson, Leonard had reported that Nesseth was still refusing a fight with Hart. Gibson stated, "Well, it's too bad. I could have saved the club if I could have made that fight."

On May 11, Gibson flew to Los Angeles with William Daly, named as an unindicted co-conspirator. Leonard was out of town and was telephoned by Gibson, who advised that he had to return to Chicago but was leaving Daly there to talk to Leonard.

On May 13, after Leonard had returned, Daly called on him at his office. He wanted to know what Leonard was going to do about the money owed to Gibson. He said Leonard was in "hell of a jam" both regarding his club's financial obligations and regarding Nesseth. He said: "Carbo is really boiling." He told Leonard to call and see him at his hotel the next day.

The following day Leonard was equipped by the police with a Minifon wire recording device and also with a porta-

ble transmitting device. He then called on Daly. A lengthy conversation ensued, all of it taped.

According to Daly, Gibson was upset, saying he was in "a jackpot" because he had allowed the title to get out of "their" hands. He had accused Leonard and Nesseth of trying to destroy him, and had stated that instead "I'll have them destroyed." There was a discussion of a near fatal assault on Ray Arcel, a Carbo-controlled manager who had asserted his independence. Daly explained the technique of assault:

"See what they do. They use a water pipe, see, you know, regular lead water pipe. Lead pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see—. * * * Just an ordinary piece of paper, that's all they ever use. And you sitting in a crowd. And they try to give you two bats, and they kill you with two if they can. But they whack you twice and split your—fracture your skull, and knock you unconscious, and they just drop it, they can't—there's no heat. You can't—you haven't got no weapon on you. If they said you did it, what the hell, you drop it in a crowd or out in the street. They drop it immediately. After they do it they drop it. And after they drop it—the law—they're protected by the law. They have to have witnesses. They seen them come out and that's the guy, and that's what he used." And later: "They used a couple of kids from Boston to do it." Leonard: "They always use professionals, guys from out of town." Daly: "Yeah, they were kids." Leonard: "Like here, if they wanted Don and I, they're not going to use somebody that we know around here." Daly: "No. The Sicas would be home."

Leonard inquired as to why Sica was becoming involved in something not his business. Daly replied: "Well then, people in New York do them favors," and later: "I don't know what way they're going to handle that Nesseth, but they are going to handle him some * * * way." Daly complained of having to stay in Los Angeles. "I got a lot of things home to try to straighten out. But Truman says, 'Wait 'til Monday.' He's coming in Monday. What'll happen Monday, Jack?"

Leonard explained how he hoped to get financial aid for his club from a San Francisco promoter, Don Chargin, and stated that now Sica wanted to see Chargin. Daly stated: "Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people. * * * You know. So it'll make the guy think a little bit, too, you know."

On June 4, Chargin was planning a trip from San Francisco to Los Angeles in connection with his negotiations with Leonard to take over the failing Hollywood Boxing and Wrestling Club. He received an anonymous telephone call as to which he testified: "The call stated to stay out of Hollywood and that they knew my flight number and also that 'you saw what happened to Jack Leonard' * * *." Leonard had received a beating and had been hospitalized.

In September, 1959, Leonard's club failed and went into bankruptcy. Since Leonard could no longer obtain nationally known fighters, he quit the boxing business.

Also in September the indictment against these appellants was returned.

The indictment contained ten counts. Two of the counts charged all of the appellants (together with unindicted co-conspirator William Daly) with conspiracy: Count 1 with

a conspiracy to commit extortion;[4] Count 5 with a conspir-

[4]Paragraph 5 of this count reads as follows:

"The objects of such conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to-wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

"c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

"d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan."

acy to transmit threats by means of interstate communications.[5]

In eight counts Appellants Carbo, Palermo and Sica were charged with substantive offenses. Carbo and Palermo were charged in Counts 3 and 2, respectively, with obtaining the sum of $1,725.00 from Leonard through threats of physical injury and violence. Palermo and Sica, in Count 4, were charged with attempts to coerce Nesseth through fear and threats of violence into giving up part of his contractual control of Jordan by signing a match with Sugar Hart. Carbo and Palermo, in Counts 6, 7, 8, 9 and 10, were charged with the interstate transmission of threats to injure Leonard and Nesseth.

---

[5]Paragraph 3 of this count reads as follows:

"The objects of said conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth and Leonard Blakely without payment of considerations for the monies and control so received."

Subparagraphs c. and d. are substantially the same as those set forth in footnote 1 as to Count I.

By jury verdict all defendants were found guilty as charged. The following sentences were imposed:

Carbo: Imprisonment consecutively for twenty years on Count 1 and five years on Count 3, a total of twenty-five years, plus a fine of $10,000.00.[6]

Palermo: Imprisonment for fifteen years on Count 1, plus a fine of $10,000.00.[7]

Sica: Imprisonment for twenty years on Count 1, plus a fine of $10,000.00.[8]

Dragna: Imprisonment on Counts 1 and 5 for five years each to run concurrently.

Gibson: Imprisonment on Counts 1 and 5 for five years each to run concurrently, plus a fine of $10,000.00. Imprisonment was then suspended and Gibson was placed on probation for a period of five years.

SUFFICIENCY OF THE INDICTMENTS

Appellants make several attacks on the indictments.

First, it is contended that Counts 1 through 4 failed to allege offenses cognizable in the federal courts because

---

[6]On Counts 5, 7 and 9, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the twenty-five years imposed for Counts 1 and 3.

[7]On Counts 2, 4 and 5, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the fifteen years imposed for Count 1. Likewise, imprisonment consecutively for five years each on Counts 6, 8 and 10, a total of fifteen years, was made to run concurrently.

[8]A sentence of five years on Counts 4 and 5 was made to run concurrently.

there is no sufficient showing that the extortion charged affected commerce. It is asserted that neither a contract between one fighter and his manager nor a share of the fighter's purse constitutes commerce.

Under the Hobbs Act (as distinguished from the Sherman Act) it is not necessary that the subject of the extortion constitute commerce. All that is required is that trade or commerce be affected by extortion "in any way or degree." The quantum of effect under the Hobbs Act is thus entirely different from that required under the Sherman Act."

This is clearly pointed out in United States vs. Malinsky, S.D.N.Y., 1956, 19 F.R.D. 426, 428, denying a motion to dismiss an indictment for failure to allege with sufficient particularity the manner in which the claimed extortion affected commerce. There it was stated:

> "Whereas under that Act it may be that a court must find that the acts complained of have a direct and substantial effect on interstate commerce, under the subject statute there is no need for such a finding. The statute provides that effect in 'any way or degree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. The substantiality of the effect is not left to judicial determination. * * * Congress quite understandably might prohibit extortion or conspiracies based on extortion which affect interstate commerce in any degree. Their corrosive quality is not

---

[8]See Hulahan vs. United States, 8 Cir., 1954, 214 F. 2d 441, 445, cert. den., 348 U.S. 856 (1954).

likely to be subject to quantitative measurement to the same extent as the economic effect of combinations in restraint of trade."

In United States vs. International Boxing Club, 1954, 348 U.S. 236, it was held that the business of promotion of professional championship boxing contests and the selling of rights to televise, broadcast and film such contests for interstate transmission constituted commerce within the Sherman Act.

Here it can hardly be denied that such commerce is affected in some degree by extortion to obtain control of a champion fighter. A sufficient effect on commerce under the Hobbs Act has then been charged.

Further attacking the sufficiency of Counts 1 through 4 to charge a federal offense, appellants contend that the Hobbs Act is vague and uncertain in its application to the boxing business and may not constitutionally be applied to the charged acts of extortion.

Undeniably the act was particularly aimed at labor racketeering, but by its terms it is not so limited.[10] Racketeering in other areas is clearly included. The language of the statute provides fair warning and adequate notice that extortion in any area is included so long as the necessary effect upon commerce results.

---

[10] The legislative history of the bill indicates that while most of the drafting problems presented by the bill related to its coverage of labor activities, the bill was broadly conceived of as part of a legislative plan to deter professional gangsterism. S.Rep. No. 1440, 73d Congress, 2d Session.

It is contended that Counts 1 and 5 fail to meet the requirement of Rule 7(c), F.R.Cr.P., that they provide "a plain, concise and definite statement of the essential facts constituting the offense charged." It is asserted that they do not allege how interstate commerce was to be delayed, obstructed or affected by the charged conspiracy; or how the threats charged could yield control of Jordan or a share of his purse; or what agency of interstate commerce was to be used to convey the alleged threats; or between what points these threats were to be communicated.

It is not necessary to plead such evidentiary detail.[11] Subparagraph 3 of each count clearly alleged the scheme for accomplishing the criminal goals of the conspiracy, including reference to the role each of the five defendants was to play in the attainment of these goals. This is sufficient.[12]

It is also contended that the substantive counts relating to the threatening communications did not charge offenses since they failed to contain any allegation determining venue.

Rule 7(c) does not require venue to be pleaded. Since it is waivable,[13] it is not an essential fact constituting the offense charged.[14] Defendants have the right to be tried in

---

[11]Wong Tai vs. United States, 1927, 273 U.S. 77.

[12]Schino vs. United States, 9 Cir., 1954, 209 F. 2d 67, 69, cert. den., 1954, 347 U.S. 937.

[13]Rodd vs. United States, 9 Cir., 1948, 165 F. 2d 54.

[14]See Rule 12(b)(2), F.R.Cr.P.

the proper forum, not the right to be charged with the proper venue.[15]

In this case a bill of particulars giving full details respecting venue was filed one month after the indictment was returned. There was then no possibility of prejudicial surprise.[16]

The contention that §1951 is not within the power of Congress and contravenes the Tenth Amendment was refuted in Nick vs. United States, 8 Cir., 1941, 122 F. 2d 660, cert. den., 314 U.S. 687, reh. den., 314 U.S. 715, reh. den., 316 U.S. 710 (1942). The conspiracy and substantive offenses under §1951 do not merge.[17] Nor is the §371 conspiracy identical with the §1951 conspiracy.

We conclude that in all respects of which the appellants complain, the indictments sufficiently charge the federal offenses to which they were directed.

SUFFICIENCY OF THE EVIDENCE

All defendants assert a lack of substantial evidence of guilt upon all counts in which they were charged. Our discussion of this contention is, of course, subject to our later discussion of other assignments of error in which attack is made upon specific portions of the record.

---

[15]Suggestions by Carbo and Gibson that they were not tried in the proper state and district are not open to consideration since no motion for change of venue under Rule 21(b) was made below.

[16]Compare Bratton vs. United States, 10 Cir., 1934, 73 F. 2d 795.

[17]Callanan vs. United States, 1961, 364 U.S. 587.

Accepting the facts and the testimony as we have recited them, the contentions of Carbo, Palermo and Sica may be summarily dismissed as to the substantive counts. Their contentions are founded in large part upon an attack on the credibility of Leonard. We shall not disturb the jury's determination in this respect.

Likewise, as to the Count 1 conspiracy the evidence is amply sufficient as to these three appellants. Their active and joint participation in overt acts which themselves constituted substantive offenses leaves little doubt but that they knowingly acted in concert and pursuant to plan.

Likewise, as to the Count 5 conspiracy there can be no doubt but that Carbo and Palermo knowingly acted in concert and pursuant to plan.

As to the Count 5 conspiracy there is no evidence that Sica and Dragna entered the plot before the interstate threats had been communicated and the conspiracy fully consummated. We find no evidence that they had any knowledge of the plot at the time of the interstate threats, nor anything from which an inference of conspiratorial association or agreement at that time might be inferred. The jury's verdict upon Count 5 should have been set aside as to these appellants. As to Appellant Sica the court's failure to do this is without prejudice in the light of his twenty-year sentence imposed for Count 1 and the concurrent five-year sentence upon Count 4.[18]

As to Appellant Dragna, after careful consideration of the record we have concluded that there is no sufficient evidence to hold him guilty upon Count 1. The only evi-

---

[18]See Hirabayashi vs. United States, 1943, 320 U.S. 81.

dence is as to the occasion on May 4, 1959, which we have recounted, when Dragna appeared with Palermo and talked to Leonard (plus evidence that Dragna and Palermo had been seen together a day or so earlier). On this occasion Dragna was simply asked what he thought and gave his opinion. Leonard, in testifying before the California Athletic Commission, described Dragna's participation as follows. "He didn't say anything, no threats. No—in fact, he was a very good gentleman there. He did very little talking. Listened."

There was nothing said which would suggest that Dragna was an interested party. There was nothing other than his presence with Palermo which could give rise to any sinister implications that he was lending his active support to a program of violence. The United States suggests that those having an underworld reputation have the burden of refraining from acting in such a fashion (or, it would seem, from being seen in association with others) when it might be construed as evincing an interested participation or a threat of violence. We cannot agree. Leonard may have been wholly justified in the conclusions he drew, but it does not follow that Dragna may be held criminally responsible for those conclusions.

As to Appellant Dragna the district court must be reversed and the sentence set aside.

As to Appellant Gibson, charged in the conspiracy counts, it must be noted that there are in fact two distinct conspiracies involved in the facts of the case. (1) The underlying conspiracy to gain control of Jordan. For business reasons of his own, Gibson was interested in furthering Carbo's ends in this respect and it is clear that the evidence is sufficient to connect him with this underlying

conspiracy. (2) The *charged* conspiracies to accomplish the underlying purpose by extortion and threatening communications.

The United States suggests that proof of the first is sufficient without more to constitute proof of the second. This is vigorously disputed by Gibson, who contends with justification that the existence of business relations with Carbo is in itself wholly consistent with innocence of the charged conspiracies.

The United States further emphasizes the fact that Gibson himself was guilty of acts of economic coercion in making it clear on at least two occasions that should Jordan sign with Sugar Hart Leonard's economic difficulties would be over, but that unless such a fight took place Gibson would be unable to save the Hollywood Boxing and Wrestling Club.

There can be little doubt that Gibson had his own business reasons entirely apart from those of Carbo and Palermo for wishing such a fight to take place. The question is whether the record can support a determination that for these independent business reasons Gibson became a party to the Carbo-Palermo scheme for achieving control of Jordan through extortion and threats. In our view it does through proof of Gibson's connection with Daly.

Gibson brought Daly to Los Angeles in order to confer with Leonard and delegated Daly to act as his representative in discussions with Leonard. Gibson advised Leonard to this effect. One may logically conclude that in what Daly said, he spoke for Gibson and what he said related to Carbo and Palermo and was calculated to frighten Leonard into renewed efforts with Nesseth.

Accordingly, we conclude, subject to later discussion of specific points, that while judgment must be reversed as to Appellant Dragna the evidence is sufficient to support the jury verdict as to Appellants Carbo, Palermo and Gibson and, as to Appellant Sica, the verdict on Counts 1 and 4.

DECLARATIONS OF CO-CONSPIRATORS

A substantial part of the proof on the conspiracy counts consisted in what various of the co-conspirators out of court had said about their fellow conspirators. All appellants have most vigorously protested the admission of such declarations as hearsay and have contended that the district court failed adequately to instruct the jury respecting the conditions under which such declarations may be used against conspirators other than the declarant.

It is well established that the declarations of one conspirator in furtherance of the objects of the conspiracy, made to a third party, are admissible against his co-conspirators.[19]

It is also well established, however, that such declarations are admissible, over the objection of a co-conspirator who was not present when they were made, only if there is proof independent of the declaration that he is connected with the conspiracy. Glasser vs. United States, 1942, 315 U.S. 60, 75: "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

---

[19]Logan vs. United States, 1892, 144 U.S. 263, 309.

The following instruction was offered and was rejected:[2]

"You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the

---

[2]The district court in its charge to the jury did deal with the substance of this instruction as to Appellant Gibson. It charged:

"You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy."

Also, in admitting certain declarations of Appellant Palermo, the court stated:

"I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the conspirators. But that rule only applies if there are co-conspirators.

"Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator."

tentative basis is destroyed and all such testimony must be ignored as to him.

"A defendant's connection with a conspiracy must be established beyond a reasonable doubt, accordingly, by his own conduct and his own statements or declarations."

We cannot accept appellants' view of the law as set forth in the proposed instructions. The declarations, as to defendants other than the declarant, constitute hearsay. Yet with a proper foundation they would qualify under the well recognized exception which permits the introduction of declarations of a co-conspirator.[21] The problem of co-conspiratorial declarations, then, is one of the admissibility of evidence under a well recognized exception to the hearsay rule. It is not a substantive question as to the

[21] The necessary foundation consists of three distinct prerequisites. First: that the declaration is in furtherance of the conspiracy; second: that it was made during the pendency of the conspiracy; third: that there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it. See authority, infra, footnote 22; Uniform Rules of Evidence, 63(9); Model Code of Evidence, Rule 508(b). Only the third element is controverted here, save as may hereafter be discussed.

qualitative sufficiency of the evidence necessary to prove the existence of a conspiracy.[22]

The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits.[23] The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law, as set forth in the proposed instructions, is that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.

---

[22]See: 4 Wigmore, Evidence (3d Ed., 1940) §1079; see generally: Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 984-989 (1959); Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954).

In analyzing this question every case that has come to our attention has done so from the point of view of whether the declarations were "admissible" or "competent" evidence. Most recently in Wong Sun vs. United States, 1963, ... U.S. ....., ..., the Supreme Court has recognized that "the rule which regulates the use of out-of-court statements is one of admissibility, rather than simply of weight, of the evidence."

[23]See discussion, Maguire and Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence, 1927, 40 Harv. L. Rev. 392, 415.

Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declarations at all. The district court in effect will have told the jury, "You may not consider this evidence unless you first find the defendant guilty."

The point is made in United States vs. Dennis, 2 Cir., 1950, 183 F. 2d 201, 230-231, affirmed 1951, 341 U.S. 491, where it is stated:

> "It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what the jury had already decided. In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all."

In Rowley vs. Braly, 1926, Texas Civil Appeals, 286 S.W. 241, 245, the same thought is expressed:

> "If the conspiracy is established, then what purpose can the declarations and statements introduced in evidence serve? * * * If this [rule giving the determination to the judge] is not correct, of what avail would the proof of such declarations be to the party offering them."

Finally, Maguire and Epstein, supra footnote 23, at page 407 (their footnote 47), agree that:

> "If the other evidence satisfied the jury that the conspiracy has been entered into, the co-conspirator's declarations can fulfill no useful function."

We find the quoted authorities persuasive. To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt. It will not do to tell the jury that it must reach its determination first.

The rule of law for which appellants contend would, then, effectively condemn this entire exception to the hearsay rule. This result we must reject.

Nor could this exception be rescued by giving the preliminary question to the jury to be decided by it upon the basis of a prima facie case rather than proof beyond a reasonable doubt. The jury is already concerned with the evidence-weighing standards involved in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence, separating that produced by the declarations from all other; but as well to apply to the independent evidence the entirely different evidence-weighing standards required of a prima facie case, is to expect the impossible. As stated in Denzis, supra at page 231:

> "Indeed it is a practical impossibility for laymen and for that matter for most judges to keep their minds in the isolated compartments that this requires."

Indeed, the injection of the standards of a prima facie case into a jury determination (even though carefully isolated, by instructions, from the ultimate determination of guilt) might very well be found to cause confusion as to standards of proof highly prejudicial to the defendant.

Therefore, we adopt in this situation the orthodox prevailing view of the allocation of functions between judge and jury, which assigns to the judge decisions upon preliminary questions of fact determinative of the admis-

sibility of evidence challenged under technical evidentiary rules.[2].

Our position is supported by language in United States vs. Dennis, supra at page 231:

> "The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent."

It is for the judge then, and not the jury, to determine the admissibility of the declarations. In making this determination the test is not whether the defendants' connection had by independent evidence been proved beyond a reasonable doubt, but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made. Thereafter it is the jury's function to determine whether the evidence, including the declarations, is credible and convincing beyond a reasonable doubt.

The trial judge's finding on admissibility in no way restricts the jury's inquiry into guilt or innocence. As stated in United States v. Dennis, supra at page 231, quoting from United States v. Pugliesi, 2 Cir., 1945, 153 F. 2d 497, 500:

---

[2]See Maguire and Epstein, supra.

"'The admissibility of the wife's declarations in the case at bar was for the judge, and the fact that the jury later acquitted her was irrelevant. The issue before him was altogether different from that before them: he had only to decide whether, if the jury chose to believe the witnesses, Pugliesi and his wife were engaged in a joint undertaking; they had to decide whether they believed the witnesses beyond a doubt.' No doubt this conclusion permits the jury to act upon hearsay, because they may be satisfied of the 'joint undertaking' only because of the declaration; but it often happens that hearsay is competent, and this is the only practicable way to deal with the question."

It must be conceded that in many cases instructions such as that proposed by appellants have been held proper. We know of no case save one,[25] however, in which the failure to give such an instruction has been held error.

---

[25] In Schmeller vs. United States, 6 Cir., 1944, 143 F. 2d 544, hearsay documents had been admitted in absence of an establishment of a prima facie case by independent evidence. The court agreed with defendants that the jury should not rightly have considered the hearsay evidence, but instead of noting error in the judge's failure to remove the evidence from jury consideration by an erasure instruction when the necessary showing had not been made, the court placed the blame on the judge's failure to instruct the jury to try the admissibility point for themselves. We cannot agree with this solution. When no prima facie case is made out, the rights of the defendants can hardly be protected by permitting the jury to find that the evidence was nonetheless admissible.

Cases cited by appellant as holding to this effect we find distinguishable.[26]

Appellants assert that there was a lack of a prima facie case made out by independent evidence and that the declarations were inadmissible for this reason. We cannot agree. There was ample as to each appellant, as the district court on motion for new trial noted.

We conclude that it was not error to admit against the appellants the declarations of their co-conspirators, nor to fail to give the requested instruction.

ELECTRONIC RECORDINGS AS EVIDENCE

Three electronic recordings of conversations were received in evidence over appellants' objection.

The Daly-Leonard conversation on May 14, 1959, was recorded by two independent methods. Leonard was equipped with a Minifon, a miniature wire recording device. The wire recording made on Leonard's person by this method was received in evidence. Leonard also was equipped with a miniature radio transmitter. The conversation was picked up in a neighboring room, through a radio receiver and was there recorded on tape.

Appellants contend that these exhibits were inadmissible since they were secured in violation of the Fourth Amend-

---

[26] Lutwak vs. United States, 1953, 344 U.S. 601, dealt with declarations not in furtherance of the conspiracy, which, it is well recognized, are limited in their application to the declarer alone. Oras vs. United States, 9 Cir., 1933, 67 F. 2d 463, where an instruction was held erroneous, involved lack of a prima facie case aliunde the declaration.

ment. They assert that Leonard obtained access to Daly's room under false pretenses amounting to an unlawful search and seizure.

We have held to the contrary upon this point in Todisco vs. United States, 9 Cir., 1961, 298 F. 2d 208, cert. den., 1962, 368 U.S. 989. Appellants request us to re-examine our decision in that case and overrule it. We decline and adhere to our opinion as there expressed.[27]

Appellants further claim that these exhibits were inadmissible because secured contrary to 47 U.S.C. §301, which provides that "no person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * * except * * * with a license in that behalf * * *." Although Leonard had no license, "no policy against admission of evidence secured by the radio operation can be said to arise from such lack." Todisco vs. United States, supra at page 211.

On May 5, 1959, Palermo telephoned Leonard at his home and attempted to persuade him to come to a restaurant where Palermo and Sica were waiting for him. Palermo told Leonard that he had been contacted by Carbo and that he and Leonard had to place a call to Gibson. This conversation with Palermo was recorded by Leonard with the aid of a Los Angeles police officer through an induction coil placed beside Leonard's home telephone.

Appellants contend that this recording was indamissible

---

[27] Accordingly, we find it unnecessary to discuss the question of whether these appellants have standing to assert a violation of Daly's constitutional rights.

in evidence since it constituted a violation of 47 U.S.C. §605.[28] We disagree.

In Rathbun vs. United States, 1957, 355 U.S. 107, it was held that the contents of a conversation overheard on a regularly used telephone extension with the consent of one party to the conversation did not constitute an unauthorized interception.

Appellants would distinguish Rathbun upon the ground that use of an induction coil constitutes, mechanically, a physical interception which is not the case with a regularly used extension phone. Again we disagree. As the record demonstrates, the induction coil is placed against the side of the telephone instrument where it serves as a listening device much in the nature of a tuning fork. There is no physical connection with or interruption of the telephone electrical circuit.[29]

---

[28] "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purpose, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *."

[29] Appellants further suggest that use of the induction coil violates some regulation of the Federal Communications Commission. No objection on this basis was made at trial and we are not referred to the regulation in question.

But further, we do not understand that the mechanical nature of the method of overhearing is now to be the guidepost in this area. The controlling principles, it would seem, are substantially the same as those which guided us in Todisco.

In Rathbun, at page 110, it is stated:

> "The clear inference [from the language of §605] is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it. The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose."

We find no distinction between holding out the handset and permitting an outsider to hear through the use of an induction coil.[30]

Nor does the recording of this legally overheard conversation render the overhearing and divulging of the conversation improper.[31]

---

[30]See Ferguson vs. United States, 10 Cir., 1962, 307 F. 2d 787; Carnes vs. United States, 5 Cir., 1962, 295 F. 2d 598, cert. den., 1962, 369 U.S. 861.

[31]Carnes vs. United States, supra, at page 602; see also Hall vs. United States, 5 Cir., 1962, 308 F. 2d 266, cert. den., 1963.

We conclude that it was not error to receive these recordings in evidence.

SICA'S UNDERWORLD REPUTATION

Sica moved to dismiss the indictment against him (Counts 1 and 5) for the reason that he was unduly prejudiced by the charge in Paragraph 3(c) (see footnotes 4 and 5) that the conspiracy contemplated the use of "persons known to said victim to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence" and the enlistment of Sica for this purpose. The motion was denied. Sica also objected to the introduction of testimony by Leonard and Nesseth to the effect that by reputation they knew of Sica as an "underworld" man and a "strong-arm" man. The objection was overruled. Sica assigns error in these respects.

In discussing the admissibility of evidence of bad moral character the Supreme Court in Michelson vs. United States, 1948, 335 U.S. 469, 475, states:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer vs. United States, 245 U.S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant;

on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[32]

The subjects of confusion of issues and unfair surprise will be discussed later.

Whether in this case prejudice was undue would seem to us to depend upon the purpose served by the charge, and the issue to which the prejudicial evidence was relevant, and a consideration of the probability of harm to the defendant in the light of these facts.

The nature of Sica's reputation was not introduced into the case for the purpose of characterizing him as a bad man likely to resort to the conduct with which he is charged. This was not the source of its relevance.

Instead the prosecution relied on the reputation of Sica as a probative fact enabling the jury to infer that Sica had intervened with Leonard and Nesseth knowing that his presence would instill fear in them and intending to manipulate this fear for the benefit of Carbo and Palermo; and further, to conclude that Carbo and Palermo had secured Sica's participation with full realization that his effectiveness was based upon the fear his reputation could inspire in the victims.

---

[32]See also: 1 Wigmore, Evidence, 3d Ed., 1940, §§ 55, 57; Uniform Rules of Evidence, Rule 47; Model Code of Evidence, Rule 306(1).

In cases of extortion based upon fear of violence the facts of fear, actual or anticipated, and of its reasonableness, are vital factors. To prove a substantive act of extortion it is essential to show the generation of fear in the victim.[33] To prove a substantive act of attempted extortion it is necessary to prove an attempt to instill fear. To prove a conspiracy to extort it is necessary to show a plan to instill fear.

Here Sica stood in the position of a dangerous weapon to be used to strike fear into the hearts of Leonard and Nesseth. It was part of the prosecution's case to charge and to prove that the conspirators considered Sica to occupy this position. That Leonard and Nesseth considered him to be dangerous and that fear reasonably resulted from his appearance because of his reputation constituted relevant facts upon this part of the prosecution's case. "* * * there is a rational connection between the existence of the criminal agreement—'the partnership in crime'—and the fact that the acts upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed * * *." United

---

[33]Bianchi vs. United States, 8 Cir., 1955, 219 F. 2d 182, 188-190, cert. den., 349 U.S. 915, rehearing den., 349 U.S. 969; Nick vs. United States, 8 Cir., 1941, 122 F. 2d 660, 671, cert. den., 314 U.S. 687, rehearing den., 314 U.S. 715, reh. den., 316 U.S. 710. See United States vs. Compagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U.S. 867, rehearing den., 325 U.S. 892.

States vs. Compagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U.S. 867 (1945), reh. den., 325 U.S. 892 (1945).[5]

It is true that (despite the precautionary steps taken by the judge as later discussed) the jury may have permitted this evidence to bear upon the probability of Sica's

---

[5] In this case Judge Learned Hand, disagreeing with the majority of the court, found the fact of fear irrelevant in a conspiracy case, although agreeing to its relevance in a case of substantive extortion. It does not appear from that case, however, that the plan of the conspirators was to instill fear in their victims. The opinion states at page 526:

> "So far as appears they did not expressly threaten violence but confined themselves to a pretense of union activity; they threatened to call strikes against their victims unless they were plentifully paid."

Judge Hand was of the view that evidence of the victim's fear of acts of violence incidental to the strike was irrelevant and inadmissible in absence of any showing that this fear was communicated to the conspirators.

Accepting Judge Hand's minority view might have merit under the circumstances of that case, the situation appears entirely distinguishable from that at bar.

Here it is charged that fear of Sica was intended to serve as the very source of coercive power and the use of west coast enforcers had been expressly threatened. Furthermore, the victims' fearful states of mind here were fully disclosed to every one of the conspirators. Gibson from the outset knew that Leonard and Nesseth were apprehensive that Carbo and Palermo would resort to force and was requested by Leonard to intervene after Sica entered the picture. Palermo admitted knowledge that Leonard and his wife were frightened. Sica, himself, noting Leonard was taken aback by his presence, had asked Leonard whether "you feel there's some type of repercussions by my coming in here?"

guilt. The question is whether this possibility renders such evidence unduly prejudicial and inadmissible. If so, the United States is precluded from establishing a material part of its case.

The question then is not whether the United States may use Sica's reputation as a sword against him, but whether he may himself make use of it as a shield to immunize himself from proof of the means by which the conspirators planned to frighten their victims into submission. If he may, then all who are known to live by violence are free to extort by the tacit threat of violence conveyed by their reputations; for the reasonableness of the resulting fear, as determined by its cause, may not be presented to the jury.

We cannot accept this result as a sound balance of the conflicting interests involved.

This, in our judgment (with such safeguards as were taken by the trial judge), is a proper case for application of what has been termed the "multiple admissibility doctrine." As stated in 1 Wigmore, Evidence (3rd Ed., 1940) §13, page 300:

> "When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule."

In State vs. Belisle, 1920, 79 N.H. 444, 111 Atl. 316, 317, this doctrine was applied. There defendant Lyman was charged with assault upon a policeman. The victim,

Fox, had sought to defend himself by drawing a gun. To justify this defense he was permitted to testify that Lyman was, Fox believed, a man who would resort to force. The court stated:

> "The argument that the disposition, character, and reputation of Lyman are not evidence that he assaulted Fox is sound. The difficulty with the defendant's case is that, while the evidence was not admissible for that purpose, it was clearly admissible to prove the reasonableness of the mode of defense from threatened attack adopted by Fox. As the evidence was admissible for some purpose, a general exception to it was unavailing."

To avoid confusion of issues and to foreclose the jury from using the reputation evidence to convict defendants on the "bad man" theory, the court below, upon admitting the testimony in question, instructed the jury as to the limited consideration which might be given.[35] The subject was

---

[35] "* * * there is an old basic principle in American law respecting the trial of criminal cases, and that is that the reputation of a defendant is just not the thing in issue. You are trying a specific charge or a specific group of charges that are set forth in the indictment.

"Now, a person who is, generally speaking, a fine upstanding citizen might occasionally go out and commit an occasional crime, and a man who has a bad reputation might never commit one. He might not deserve the reputation, because reputation is something different from character. Character is the quality of person you are and reputation is what is believed in certain quarters regarding certain aspects of your life. It might be justified. It might not.

"So it would be very easy, unless the jury disciplines itself to consider the evidence for the purpose for which

again dealt with in the court's charge to the jury. We have no doubt but that to the maximum extent possible, prejudice flowing from any confusion of issues by the jury was eliminated.

There can be no question of unfair surprise. A pre-trial offer of proof upon this matter was made by the prosecution thirteen months before the trial commenced.

We conclude that the district court did not err in denying Sica's motion to dismiss the indictment or in admitting the evidence of Sica's reputation.

ANONYMOUS THREATENING TELEPHONE CALLS

In our statement of the facts we have recounted the receipt by Don Chargin of an anonymous telephone call just prior to his leaving for Los Angeles in connection with negotiations with Leonard to take over the Hollywood Boxing and Wrestling Club. The caller warned Chargin to stay out of Hollywood.

Appellants objected to this testimony as irrelevant for lack of connection to any of the appellants and highly prejudicial. After a considerable discussion of the objection out of the presence of the jury, the court concluded:

---

it is admitted, to get off on the track of whether or not a particular defendant has a reputation of a certain kind or other.

"Now, it is contended here by the Government that this witness Leonard was put in fear of Mr. Sica and I think they are entitled to show or have Mr. Leonard tell why he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way."

"I think the problem will be one for the jury. I have an ancillary problem, to properly instruct them. You are invited to submit instructions on it, but the objections are overruled."

The jury was then advised by the court:

"The jury must of course bear in mind that the witness says this is anonymous. Now, what's anonymous ordinarily in life doesn't mean much, but sometimes what is anonymous is anonymous in form and you can fit it into the context of things. Whether this is the first situation or the second is going to depend upon the total context of the case, and just don't go deciding the issue on it until you have heard all the evidence and the instructions."[36]

Admission of this testimony under the circumstances is assigned as error.

The fact that Chargin could not identify the speaker does not necessarily render this testimony inadmissible. If identity could be found by the jury from other circumstances, admission of the testimony was proper.

The issue of authenticity—the identity of the author of a particular item of evidence such as a document or phone call—is for the jury once a prima facie case of authorship is made out by the proponent of the evidence.[37] The con-

---

[36]No instructions upon this subject were offered.

[37]United States vs. Tellier, 2 Cir., 1958, 255 F. 2d 441, cert. den., 358 U.S. 821 (1958). See 7 Wigmore on Evidence, §2135, McCormick on Evidence, §194, Model Code of Evidence, Rule 601(a) (1942). That the procedure for handling the issue differs from that which we found proper

nection between a telephone call and the caller may be established circumstantially.[38] The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent. The scope of appellate review upon this issue is confined to determining whether the admission constituted abuse of judicial discretion in determining that a prima facie case had been made out.[39]

Upon the record we cannot say that the admission of this testimony constituted abuse of discretion.

---

with respect to declarations of co-conspirators is explained by the text writers. McCormick, supra at page 407, states:

> "It must be noticed, however, that authenticity is not to be classed as one of those preliminary questions of fact conditioning admissibility under technical evidentiary rules of competency or privilege. As to these latter, the trial judge will permit the adversary to introduce controverting proof on the preliminary issue in support of his objection, and the judge will decide this issue, without submission to the jury, as a basis for his ruling on admissibility. On the other hand, the authenticity of a writing or statement is not a question of the application of a technical rule of evidence. It goes to genuineness and relevance, as the jury can readily understand, and if a prima facie showing is made, the writing or statement comes in, with no opportunity then for evidence in denial. If evidence disputing genuineness is later given, the issue is for the jury."

[38] Andrews vs. United States, 10 Cir., 1935, 78 F. 2d 274. See 7 Wigmore on Evidence, §2155(1)(b).

[39] See Wigmore on Evidence, §2135 and cases cited therein; McCormick on Evidence, §194.

Daly, a member of the conspiracy, had told Leonard that this warning would most likely be given by the conspirators and why. A month prior to the warning Sica had surreptitiously contacted Leonard's assistant and attempted to have him ascertain when Chargin planned to be in town and where he could be reached by telephone.

These facts, plus the manner in which the warning so obviously fitted into the conspiracy scheme, are sufficient to warrant reasonable men in concluding that the telephone call had been made by or at the direction of one of the conspirators in furtherance of the conspiracy, and thus, irrespective of the precise identity of the speaker, was binding on all appellants.

Appellants also assert as irrelevant and prejudicial Leonard's testimony to the effect that he had received threatening telephone calls between May 20 and November 1, 1959.

The testimony was given on redirect examination. On cross examination appellants had attempted to impeach Leonard's credibility by showing that he had through his wife corruptly expressed a willingness to suppress his testimony and depart the country if he were paid $25,000.00.

On redirect examination the United States sought to explain this offer as founded not on corruption but on fear. The testimony of the threatening telephone calls was relevant to this issue and constituted a proper method of rehabilitating the witness.[40] The resulting prejudice was

---

[40]See Bracey v. United States, D.C. Cir., 1944, 142 F. 2d 85, 89, cert. den., 322 U.S. 762; 4 Wigmore on Evidence, §1119; McCormick on Evidence, §49.

carefully minimized by the prosecution. The contents of the calls were not divulged to the jury.

We conclude that it was not error to permit testimony as to the anonymous threatening telephone calls.

MISCELLANEOUS MATTERS OF EVIDENCE

Sica asserts as error the admission of testimony given by Leonard with reference to one Tom Stanley. Leonard testified that Stanley, a friend of Sica's had called on him on occasions at about the time the indictments were handed down, seeking to persuade Leonard not to give testimony in appellants' trial. On two occasions Stanley had been accompanied by one Steve Calla. Stanley had stated to Leonard that Calla was a friend of Sica's and a convicted murderer. In Leonard's words, "He said Mr. Calla had been in the penitentiary in Cleveland for murder and I said 'Murder?' He said 'Yes, he beat them to death. He was a strong-arm man.'"

Sica contends that this testimony by Leonard of conversations had with Stanley constituted hearsay.

There can be no question but that the testimony was inadmissible for the purpose of establishing that what Stanley had said was true. It was not admitted for this purpose, however. Its purpose was to impeach and discredit Stanley as a witness.

Stanley had been called as a witness by Sica and had given testimony which, if believed, would have reflected upon the credibility of Leonard. The government sought to show bias and complicity upon Stanley's part; that even though he was not named as a co-conspirator, he was actively engaged in furthering the ends of the conspiracy.

Also, as in the case of the anonymous telephone threats to Leonard, the testimony had the purpose of showing Leonard's state of mind at a time when he was charged with having corruptly proposed to appellants that for a consideration he would avoid the giving of testimony by leaving the country.

In both these respects the testimony was relevant and competent.[11] The question was not whether what Stanley said was true but whether Stanley had said it. This was made clear by the court in an admonition to the jury.

We find no error in the admission of this testimony.

Sica charges the government with misconduct in asking on cross examination whether he had been convicted of the crime of bookmaking.

On direct examination Sica had testified with respect to his felony record and had admitted to two convictions. On cross examination he had admitted a third. He was then asked whether in 1951 he had been convicted of a conspiracy to violate certain sections of the Penal Code of California relative to bookmaking. In colloquy following objection by Sica's counsel, it appeared that although the exemplified copy of judgment in the government's possession denominated the crime as a felony, a misdemeanor type of sentence had been imposed rendering the conviction one for misdemeanor.

Counsel for Sica then moved to strike the question and asked the court to instruct the jury to disregard it. This the court did to the express satisfaction of Sica's counsel, who conceded that the government apparently had acted

---

[11] See 3 Wigmore on Evidence, §§948-949, 956, 960.

in good faith. The following day Sica's counsel, reversing his judgment as to the good faith of the government, moved for mistrial. The motion was denied.

In our judgment, the court acted properly. We note that the question under attack never was answered. We have difficulty finding any prejudice. Sica had admitted three felony convictions including robbery. A jury suspicion that he may also have been convicted of a misdemeanor would not seem to add measurably in the credibility balance. Furthermore, the admonition of the judge was clear and commanding and in our judgment was an adequate remedy.

We conclude that it was not error or abuse of discretion to deny Sica's motion for mistrial.

Nesseth and one other witness, McCoy, were permitted over objection to testify to conversations had with Leonard, during which Leonard had recounted to them the threatening statements made to him by Carbo. Carbo asserts that this testimony was inadmissible as hearsay.

Leonard had already testified to the fact that these threats had been made. The testimony of Nesseth and McCoy was relevant proof of the state of mind of Leonard and of the effect which the threats had had upon him. It was competent evidence for this purpose and its admission was not error.

Appellants assert error in the admission of testimony by Leonard as to extortionate demands by Carbo not related to those here in issue. In our judgment, these were relevant in bearing upon intent and in showing Carbo's general plan or scheme to dominate the boxing field.[42]

---

[42]See Bush vs. United States, 9 Cir., 1959, 267 F. 2d 483, 489; 2 Wigmore on Evidence, §§300, 302, 304.

Carbo in his briefs has listed fifteen items of evidence which he contends were irrelevant and prejudicial. As to the bulk of these we do not regard them as irrelevant. To the extent that they were we find no prejudice. In any event, they did not form the basis of any assignment of error.

Appellants contend that evidence of the Daly-Leonard conversation should not have been admitted since that conversation did not serve to further the conspiracy. We think it obvious that it did.

CHARGE TO THE JURY

Rule 30, F.R.Cr.P., provides that any party may file requests for instructions and that "the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed."

Appellants filed extensive requests for instructions. The district court advised appellants that he rejected all requests in the forms submitted because of their prolixity and confusing draftmanship. He did not take issue with the propositions of law so presented, but refused to inform counsel as to the precise form his charge would take. Appellants assert that this is a violation of Rule 30 and reversible error.

Assuming arguendo that this constituted a violation of the rule as strictly read, we find no prejudice. The charge was proper, as we shall discuss. Appellants' arguments to the jury consumed four days and no suggestion has been given us as to how they might have been made more effective had the court fully and precisely disclosed the sub-

stance of its charge. Therefore, we find no reversible error.[43]

In one respect appellants were placed at a disadvantage by virtue of the court's method of procedure: It was rendered difficult for them to comply with the requirement of Rule 30 that error in the giving of instructions may not be asserted unless objection is made before the jury retires to consider its verdict. The government here asserts that appellants are foreclosed by this provision of the rule from asserting error in the charge. In our judgment, this provision should not apply under such circumstances as we find here. We therefore proceed to a consideration of those errors assigned by appellants relative to the charge.

Appellant Gibson presented evidence of good character and assigns as error the district court's failure to instruct the jury that such evidence alone may create a reasonable doubt of guilt.

Upon this proposition of law the circuits are divided. The Tenth (joined by the Seventh) holds in accordance with Gibson's contention.[44] The remaining circuits do not require any more than that the jury be freely permitted to consider character evidence along with all other evidence upon the issue of guilt.[45] Such is the rule in this circuit.[46]

---

[43]Watada vs. United States, 9 Cir., 1962, 301 F. 2d 869, 870.

[44]Peterson vs. United States, 10 Cir., 1959, 268 F. 2d 87.

[45]See footnote 3 of the Peterson case, supra (our footnote 44) at page 89.

[46]Kaspar vs. United States, 9 Cir., 1955, 225 F. 2d 275, 278-279.

It is in the interpretation of Edgington vs. United States, 1896, 164 U.S. 361, that the circuits appear to differ. There the Supreme Court stated, at page 366:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

In support of Gibson's position, a dictum in Michelson vs. United States, 1948, 335 U.S. 469, 475, referring to the privilege of introducing character evidence states:

> "This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed, Edgington vs. United States, 164 U.S. 361."

Edgington, however, did not say or suggest that character evidence is so highly probative that it must, upon penalty of reversal, be singled out from the bulk of the testimony for special treatment. In Edgington the court was faced with an instruction which confined the jury's consideration of character evidence to cases where the evidence was in conflict or where the rest of the evidence created a doubt of guilt. It held such limitation improper. It did not hold that the lack of limitation must be expressly pointed out to the jury.

Here the district court charged:

> "The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole."

The court went further, however, even approaching Gibson's proposed instruction. It gave as an example a Governor of the State of New York accused of robbery and, with repeated reference to this example, pointed out that "it would be very, very unlikely that a person of that reputation would be out as a stickup man." It thus strongly suggested to the jury that it might find it improbable that a man of good reputation would commit a particular crime.[11]

Under the view of the law adopted by this court, the instructions upon this point were adequate.

Appellants claimed that the trial court failed to make a finding that the defendants' activities complained of affected interstate commerce so as to sustain federal jurisdiction. The judge instructed the jury that "if boxing matches are in fact televised and television is sent into other states, that brings it within ambit of interstate commerce." This was sufficient.[12]

---

[11] Compare Alverez vs. United States, 9 Cir., 1960, 282 F. 2d 435, 436.

[12] Hulahan vs. United States, 6 Cir., 1954, 214 F. 2d 441, 445-6, cert. den., 348 U.S. 856 (1954).

Appellants assert error in the instruction relative to the necessity for proof of overt acts in order to establish conspiracy under §371. The court charged

> "It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid."

Appellants contend that it was error to tell the jury that an act done at the direction of the defendants or with their aid would satisfy the requirement.

We disagree. 18 U.S.C. §2(b) recognizes the principle of criminal agency in the federal law. It provides:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Furthermore, an instruction in accordance with appellants' views was given elsewhere in the charge. While appellants contend that this constitutes at best a conflict between instructions, we find no prejudice resulting. Since both Carbo and Palermo were found guilty on their substantive counts, the jury clearly found that overt acts had been committed by these defendants on both conspiracy counts.

Appellants assert that an instruction on aiding and abetting was confusing. We do not find it so. They assert that the court failed to instruct clearly on reasonable doubt. We regard the charge as perfectly clear. They criticized the court's explanation of the division of functions between court and jury as tending to lull the jury into a sense that

their responsibility was not final. We disagree. We find no merit in appellants' complaint that the court failed to define the term "underworld."

MISCELLANEOUS ASSIGNMENTS OF MISCONDUCT, VIOLATION OF DUE PROCESS AND OTHER MATTERS

Appellants assert that they were denied due process because the prosecution permitted false evidence to go uncorrected.

Leonard was caught up in a falsehood with reference to his alleged solicitation of hush money from appellants. He testified that it was his wife and not he himself who had acted in this respect. A tape recording of a conversation between Leonard and Palermo, introduced by appellants, demonstrated the contrary. Appellants' position is that the government thus solicited false testimony and failed adequately to apprise the jury of the truth, relying on Napue vs. Illinois, 1959, 360 U.S. 264.

In that case denial of due process lay in the fact that the truth, known to the prosecution to be contrary to its witnesses' testimony, was never brought home to the jury. Here the truth, known to the defendants, was brought home to the jury in the most effective possible way. Furthermore, government counsel in argument to the jury conceded that Leonard was not testifying truthfully in this regard.

Defendants appear to be contending that when a government witness has been discredited in one respect, the United States is obligated to disown him. We disagree. When the falsity of testimony is brought home to the jury, it remains the jury's function to determine to what

extent that witness' testimony is otherwise worthy of belief.

Gibson contends that he was promised that his indictment would be dismissed. We find no substantial or credible evidence tending to show such a promise. In other respects, appellants protest that there was misconduct and deprivation of fair trial; alleged distortion of evidence by the government in closing arguments; permitting Nesseth and McCoy to sit before the bar of the court during closing arguments so that government counsel might point them out; the court's interrupting Carbo's counsel with questions during his argument. In none of these matters do we find merit.

Appellants contend that they have been denied due process and equal protection of the laws through denial of bail during trial. These contentions have already been made to this court in two prior appeals and there disposed of.[49]

Gibson, being of the colored race, asserts that unconstitutional discrimination occurred in the selection of the jury venire through systematic exclusion of Negroes. There was no proof of exclusion; only of the fact that out of fifty veniremen none was a Negro. Testimony of the clerk of the court as to the manner of selection effectively refuted this contention, and Gibson's offered proof of racial population statistics would not have been persuasive to the contrary. "Purposeful discrimination is not sustained by showing that on a single grand jury the number

---

[49]Carbo vs. United States, 9 Cir., 1961, 288 F. 2d 282; Carbo vs. United States, 9 Cir., 1961, 288 F. 2d 686, cert. den., 1961, 365 U.S. 861.

of members of one race is less than that race's proportion of the eligible individuals." Akins v. Texas, 1945, 325 U.S. 398, 403.[50]

Appellants contend that the district court's method of handling challenges to the jury violated Rule 24(b) in that it did not assure the defendant their minimum number of challenges. The district judge required each side simultaneously to submit their challenges in writing to the clerk. The same juror might thus have been challenged by both sides. This is not improper.[51]

Gibson asserts that he was allowed only one challenge as to the three alternate jurors while Rule 24(c) grants him two challenges. This matter, however, was never presented to the district court and must be considered as waived.

Gibson contends that he was improperly denied severance. We disagree. The substantive counts in which Gibson was not charged still constituted overt acts attributable to him on the two conspiracy counts in which he was charged.

RULINGS OF THE SUCCESSOR JUDGE

Following trial and jury verdict and while motions for new trial by all appellants and a motion for acquittal by Appellant Dragna were pending before him, Judge Ernest A. Tolin, the trial judge, died. Judge George H. Boldt was assigned to succeed him. A supplemental motion for new

---

[50]See also Cassell vs. Texas, 1950, 339 U.S. 282, 286-7.

[51]Pointer vs. United States, 1894, 151 U.S. 396, 412; Hanson vs. United States, 9 Cir., 1959, 271 F. 2d 791, 792-3.

trial was made by all appellants under Rule 25, F.R.Cr.P.,[52] upon the ground that judicial duties in the case could not be properly performed by a successor judge. All motions were denied and Judge Boldt proceeded to impose sentence. This is assigned as abuse of discretion.

Appellants rely heavily upon dicta in Connelly v. United States, 8 Cir., 1957, 249 F. 2d 576, 580, cert. den., 356 U.S. 921 (1958), reh. den., 354 U.S. 964 (1958), where, in upholding a successor judge's decision that he could properly proceed, the court stated:

> "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character."

Appellants assert that this case is precisely of such character; that it depends almost in its entirety upon the testimony of Leonard and Nesseth, which was flatly con-

---

[52] "If by reason of absence from the district, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

tradicted by the appellants' witnesses in many material respects; that credibility of witnesses was of the essence of the case.

Accepting the statement in Connelly, we do not apprehend that where credibility of government witnesses is a serious issue it must follow ipso facto that a new trial must be had. In Bennett vs. United States, 5 Cir., 1960, 285 F. 2d 567, cert. den., 366 U.S. 911 (1961), the court held that the successor judge acted properly in passing upon defendant's new trial motion and in sentencing him even though the facts were in dispute and the resolution of factual dispute by the jury was dependent upon demeanor.

Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence. We should be inclined to emphasize demeanor rather than credibility as the vital factor upon the question here presented. The inquiry then would seem to be as to how importantly demeanor appears to loom in making the necessary credibility determinations.

Here Judge Boldt, before ruling on the supplemental motions for new trial, spent more than three months in a careful study of the record. 7,500 pages of transcript were condensed by him into an abstract of 1,320 pages. He concluded, in his memorandum order:

> "On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed a most exhaustive consideration of the record

and analysis of authority are those relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars, was fully and convincingly corroborated."

This conclusion with respect to the substance of the corroborating evidence was reiterated from the bench at the time of imposing sentence. At that time Judge Boldt also expressed his conviction, based upon actions and words of Judge Tolin, that Judge Tolin "had not the slightest doubt of the guilt of any of the defendants or of the credibility of the principal witnesses."

In the exercise of his discretion Judge Boldt has, in our view, concerned himself with the vital question. He has concluded, after most careful and conscientious study, that the corroboration Leonard and Nesseth received from other convincing evidence placed the government's case safely beyond demeanor impeachment and that Judge Tolin himself had not been disturbed by questions of credibility. His determination in this latter respect is reinforced, to some extent at least, by Judge Tolin's charge to the jury. He warned them to discount the effect fear and the courtroom atmosphere might have on witnesses and emphasized the virtue of appraising testimony by the manner in which it successfully integrated with other evidence.

We do not find abuse of discretion in the action of Judge Boldt in proceeding, as successor judge under Rule 25, to the completion of the judicial proceedings in the district court.

(Opinion of the United States Court of Appeals)

DECISION

As to Appellant Carbo, judgment affirmed.

As to Appellant Palermo, judgment affirmed.

As to Appellant Gibson, judgment affirmed.

As to Appellant Sica, judgment upon Counts 1 and 4 affirmed. Judgment on Count 5 reversed and the case remanded with instructions that judgment on this count be set aside.

As to Appellant Dragna, judgment reversed and the case remanded with instructions that judgment be entered for this defendant.

(Endorsed) Opinion Filed Feb. 13, 1963.

Frank H. Schmid, Clerk.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

PAUL JOHN CARBO, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 17,762

Appeal from the United States District Court for the Southern District of California Central Division

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment in this Cause be, and hereby is affirmed as to appellants Carbo, Palermo and Gibson; that judgment as to appellant Sica is affirmed upon Counts 1 and 4 and on Count 5 judgment is reversed and the case remanded with instructions that judgment on this count be set aside.

Filed and entered February 13, 1963.

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of * * * liberty or property, without due process of law; * * *"

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *"

(Constitutional Provisions and Statutes Involved)

18 USC 371 (62 Stat. 701) provides in pertinent part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 USC 875(b) (62 Stat. 741) provides:

"(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $[illegible]00 or imprisoned not more than twenty years, or both."

18 USC 1951 (62 Stat. 793) provides in pertinent part:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or theatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(2) The term 'extortion' means the obtaining of property from another, with his consent,

induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Rule 25, Federal Rules of Civil Procedure, provides:

"If by reason of * * * death * * * the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason he may in his discretion grant a new trial."

(Defendant Gibson's Special Instruction F)

APPENDIX D

DEFENDANT GIBSON'S SPECIAL INSTRUCTION F

There is uncontradicted evidence that the defendant Gibson has a good reputation for honesty and integrity in the community where he resides. The circumstances may be such that an established reputation for good character alone may create a reasonable doubt as to the guilt of the defendant Gibson. You should take that evidence of good reputation into consideration along with all the other evidence as to him in determining the guilt or innocence of Mr. Gibson.

COURT'S REMARKS, (R. Tr. 7697-7699)

In this case we have the conflict of problems that arises from that in the case of Defendant Gibson. As I recall it, the defendant Gibson was the only one who put his reputation in evidence. He called witnesses and they were asked questions, "Is his reputation good or bad?" And they said it was good.

That is offered as to someone under the same principle I mentioned regarding the Governor of New York. Mr. Gibson, of course, doesn't claim to be a governor of any political subdivision. He claims to be an active managing head of substantial commercial interests. He claims to be a member of the bar, and he claims to have a good reputation. This is not to say that people of good reputation are entitled to go and commit crimes. No one is entitled to commit crimes. But there might be instances, as in

(Court's Remarks)

that possibly now getting about to the limit of its usefulness in instructions, that case we mentioned as to the Governor of New York being charged with robbery.

The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole.

* * * * *

But so far as the reputation of any defendant is concerned, the only evidence here on what the reputation actually was of any defendant is that Gibson has offered evidence that his reputation was good. Insofar as I can recall, strictly in the field of reputation evidence, that is, someone getting on the stand and saying, "I know what his reputation is," there was no evidence to the contrary.

But bear in mind that reputation evidence does have a very limited purpose in the trial.

* * * * *

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	12
Conclusion	31

CITATIONS

Cases:

Akins v. *Texas*, 325 U.S. 398	22
Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U.S. 800	28
Callanan v. *United States*, 223 F. 2d 171, certiorari denied, 350 U.S. 862	23
Carnes v. *United States*, 295 F. 2d 598, certiorari denied, 369 U.S. 861	19
Connelly v. *United States*, 249 F. 2d 576, certiorari denied, 356 U.S. 921	30
Delli Paoli v. *United States*, 352 U.S. 232	16
Direct Sales v. *United States*, 319 U.S. 703	27
Ferguson v. *United States*, 307 F. 2d 787, certiorari granted, June 10, 1963	19
Glasser v. *United States*, 315 U.S. 60	14
Goldstein v. *United States*, 316 U.S. 114	21
Hall v. *United States*, 308 F. 2d 266, certiorari denied, 371 U.S. 952	19
Jones v. *United States*, 362 U.S. 257	21
Lopez v. *United States*, No. 236, 1962 Term, decided May 27, 1963	19, 20
Lutwak v. *United States*, 344 U.S. 604	16

Cases—Continued Page

Massiah v. *United States*, No. 199, this Term 21
Moore v. *United States*, 254 F. 2d 213, certiorari denied, 357 U.S. 926 28
Olmstead v. *United States*, 277 U.S. 438 20
On Lee v. *United States*, 343 U.S. 747 19
Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U.S. 1025 28
Rathbun v. *United States*, 355 U.S. 107 18
United States v. *Morris*, 225 F. 2d 91, certiorari denied, 350 U.S. 901 16
United States v. *Varlack*, 225 F. 2d 665 23
United States v. *Williams*, 311 F. 2d 721, certiorari denied, June 10, 1963 19
Use of Recording Devices in Connection with Telephone Service, In the Matter of, 11 F. C. C. 1033, 12 F. C. C. 1005 20

Miscellaneous:

Wharton, *Criminal Evidence* (12th ed.) par. 257 16

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 122

FRANK PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 134

JOSEPH SICA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 141

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 145

TRUMAN GIBSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 314 F. 2d 718.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1963. A petition for rehearing was denied on March 19, 1963. On April 15, 1963, Mr. Justice Douglas extended the time for filing petitions for writs of certiorari to and including May 18, 1963. Separate petitions for writs of certiorari were filed by Palermo on May 10, 1963, by Sica on May 16, 1963, by Carbo on May 17, 1963, and by Gibson on May 18, 1963.

QUESTIONS PRESENTED

1. Whether the court erred in its charge with respect to declarations of co-conspirators.

2. Whether the recording of a telephone conversation by a state police officer with consent of one party to the conversation constitutes the interception of a communication within the meaning of Section 605 of the Communications Act of 1934, or a viola-

tion of the Fourth and Fifth Amendments of the United States Constitution.

3. Whether electrical recordings corroborating testimony of a principal government witness about a conversation with an unindicted co-conspirator, were properly received in evidence.

4. Whether petitioner Gibson (No. 145) was denied an opportunity to show that Negroes were systematically excluded from the trial jury.

5. Whether an extortion victim may testify that his fears were partly caused by his opinion of the bad reputation of a person assisting in the extortionate demands.

6. Whether various rulings at the trial were proper.

7. Whether there were errors in the instructions.

8. Whether the successor judge, appointed pursuant to Rule 25 of the Federal Rules of Criminal Procedure to perform the remaining duties of the trial judge, who died after verdict, abused his discretion in denying a motion for a new trial.

STATEMENT

The first count of an eleven-count indictment returned in the Southern District of California charged a conspiracy among all petitioners to obstruct commerce by extorting money and obtaining control of the activities of a professional prize fighter, Donald Jordan, from victims Donald Nesseth and Leonard Blakely, also known as Jackie Leonard, in violation of 18 U.S.C. 1951. Count 5 charged a conspiracy to transmit in interstate commerce a communication

threatening to injure Nesseth and Blakely in violation of 18 U.S.C. 875(b). Palermo was charged with substantive violations of these statutes in Counts 2, 4, 6, 8, and 10, Carbo with substantive violations in Counts 3, 7, and 9, and Sica with a substantive violation of Count 4 (1 R. 1-15).[1] Petitioners were convicted as charged. Palermo was sentenced to fifteen years' imprisonment and fined $10,000. Carbo was sentenced to twenty-five years and fined $10,000. Sica was sentenced to twenty years' imprisonment and fined $10,000. Gibson was sentenced to five years' imprisonment, fined $10,000, and placed on probation on his sentence of imprisonment (6 R. 1494-1497, 1499-1500). On appeal, these judgments were affirmed except that the conviction of Sica on Count 5 was reversed, 314 F. 2d 718.[2]

---

[1] The record on file with the clerk of the court contains sixty-nine volumes. Volumes 1 through 6 consist of the original papers and proceedings in the district court. Volumes 7 through 16, separately paginated, consist of an abstract of the testimony made by the district court. Volumes 17-68, separately paginated, consist of the trial transcript. Volume 69 contains the proceedings in the court of appeals. In view of the three separate paginations, the record references are preceded by volume number.

[2] Carbo was sentenced to imprisonment for 20 years and fined $10,000 on Count 1 and to imprisonment for 5 years on Count 3, the sentences to run consecutively. He was also sentenced to imprisonment for 5 years on each of counts 5, 7, and 9, to run consecutively to each other. The imprisonment on counts 5, 7, and 9 was made to run concurrently with the imprisonment on counts 1 and 3, making a total of sentence of imprisonment of 25 years.

Palermo was sentenced to imprisonment for 15 years and fined $10,000 on count 1. He was sentenced to imprisonment

In July 1958, Donald Jordan, a prize fighter, achieved ranked fighter status as a welterweight. His manager, Donald Nesseth, prompted Leonard Blakely, known as Jackie Leonard, the matchmaker at the Hollywood Legion Stadium, to match Jordan in a televised bout, almost a prerequisite for reaching the peak in boxing. Leonard arranged several television matches for Jordan through petitioner Truman Gibson, Jr., an officer of the International Boxing Club which had control of the network televising of prizefighting. Leonard leased the Legion Stadium after Gibson, acting for the International Boxing Club, advanced him $28,000 upon future TV fight shows (28 R. 1743-1755; 21 R. 587-588, 592, 612-615).

After Jordan defeated the number one welterweight challenger and was ranked second, Nesseth accepted a rematch on assurances by Gibson that Virgil Akins, the welterweight champion, would fight Jordan. On October 23, 1958, the day after Jordan won the rematch, Nesseth went to the Olympic Auditorium in Los Angeles to arrange with Gibson for the title fight. During the ensuing meeting, attended also by Leonard and others, petitioner Palermo telephoned. He told Leonard: "We are in for half the fighter or there won't be any fight". When

---

for 5 years on each of counts 2, 4, and 5, to run consecutively with each other. He was also sentenced to imprisonment of 5 years on each of counts 6, 8, and 10, to run consecutively with each other. The imprisonment on counts 2, 4, and 5 and on counts 6, 8, and 10 were made to run concurrently with the sentence on count 1, making a total term of imprisonment of 15 years.

Leonard related this conversation to Gibson and Nesseth, the latter stated that he would not agree to such conditions. At a second meeting held that day, Gibson indicated that Palermo and petitioner Carbo controlled Akins. Gibson said that "they want all of everything before you can get a welterweight title fight" and "that is the way the welterweight and lightweight title has been worked since Carbo and Blinky [Palermo] got into the picture". When Nesseth refused, Gibson persuaded Leonard to call Palermo and pretend to agree to his terms, assuring Leonard that Gibson would arrange matters so that it would not cost Nesseth any money (28 R. 1756-1762; 21 R. 597-608; 30 R. 2057-2062). Subsequently, Palermo sought confirmation from Leonard that he could control Nesseth (21 R. 615-617). On December 5, 1958, Jordan defeated Akins and became the champion. After the fight Gibson told Leonard: "[w]e really got our necks in trouble now" (21 R. 618-619).

In January 1959, after Palermo sent him $1,000, Leonard met Palermo and Carbo in Miami (21 R. 622, 625, 628-630). Palermo said they now had to arrange a fight between Jordan and Sugar Hart, a fighter whom he controlled. They both wanted assurances from Leonard that Jordan would fight Sugar Hart after a rematch with Akins. Carbo told Leonard that they considered him responsible for handling the situation in California (21 R. 639-647, 671).

On January 22, 1959, Jordan fought another rematch. When Leonard expressed concern to Gibson

about the money which Palermo expected to receive from Jordan's purse on this fight, Gibson replied that Nesseth would not have to pay anything. On January 27, 1959, Palermo telephoned Leonard; he complained about not being paid and accused Leonard of double-crossing him. Carbo took the phone, shouted that Leonard was no good, and that "Just because you are 2,000 miles away, that is no sign I can't have you taken care of". He also said that the money better be paid because "I have got plenty of friends out there to take care of punks like you". This conversation frightened Leonard (21 R. 648-649, 657-659; 29 R. 1796-1799). When Gibson told Leonard he would repay him if he sent Palermo the money, Leonard mailed a personal check for $1,725 to Clare Cori, the wife of Palermo. Leonard was reimbursed by Gibson. Gibson assured Leonard that he could promote some good fights if he would bring Nesseth into line, suggesting that the money involved need not come out of Nesseth's pocket but could be charged off as training expenses (21 R. 660-668, 672-673; 31 R. 2139-2142).

On April 24, Jordan defeated Akins again. Prior to this match, Palermo again told Leonard that Jordan had to fight Hart and that they had to approve Jordan's bouts (21 R. 675). On April 25, after Nesseth had refused to give Palermo a share of the purse, saying that he had never consented to do so (29 R. 1809-1813; 31 R. 2225), Palermo complained to Leonard and said that he "was going to get into a lot of trouble with the people back East." Gibson

said he would give Leonard a check so that Leonard could send the money (21 R. 675-678).

On April 28, in a telephone conversation, Carbo called Leonard a double-crosser, and threatened "that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead." Carbo also threatened: "You will never get away with it. I have had that title 25 years and no punks like you are going to take it away from me . . . We will have somebody out there to take care of you . . ." This call frightened Leonard and Nesseth, who was present at the time (21 R. 680-681; 29 R. 1819-1824). Shortly thereafter, when Leonard complained to Palermo about these threats, Palermo responded that they were deserved. Palermo said he planned to send some people to see Leonard. Gibson was informed of these calls (21 R. 681-684; 29 R. 1826-1831).

About four or five days later, Palermo and petitioner Sica met Leonard in Los Angeles. Sica had Leonard and Palermo explain the controversy over Jordan. Sica said that he had been Carbo's friend for years and that Leonard was in serious trouble, that something could happen to him. When Leonard suggested that they should talk to Nesseth to settle the matter, Sica told Leonard to reach Nesseth: "Drag him in, go out and grab him by the neck and get him out of bed and shake him and get him in line". "It is a question of either you or Don Nesseth is going to get hurt . . . If you have to, go out and beat the hell out of Nesseth. If you need any

help we will go with you and help you and drag him out of bed". Palermo and Sica said the problem would be solved if Leonard would convince Nesseth to match Jordan against Sugar Hart. The meeting ended after Leonard agreed to see Nesseth the next morning. Leonard was frightened by Sica's presence because of Carbo's statement that someone would take care of him and because he knew of Sica's reputation as a strong-arm man (21 R. 684-692; 22 R. 721-725, 732-733).

On May 3, Nesseth complained to Gibson of threats and harrassment. He asked Gibson to communicate with Norris, the head of I.B.C., and the television sponsors and inform them of the kind of people with whom they were dealing. Gibson advised him that the pressure could be relieved and Leonard's club saved if Nesseth would agree to match Jordan against Sugar Hart. Nesseth declined such an agreement (29 R. 1828-1831, 1841-1842).

The next morning, May 4, Nesseth walked out of Leonard's office when Palermo entered with Louis Dragna. Palermo told Dragna that Leonard had put him "in the middle" with Carbo when he agreed to pay a percentage of Jordan's purse. Palermo again suggested that Leonard's escape from his predicament would be a match between Jordan and Hart or Flanagan. Dragna told Leonard to settle the matter or "be in a lot of trouble". Leonard's reaction to Dragna, similar to his reaction to Sica, was that he had heard that Dragna was reputed to be connected with the underworld (22 R. 727-731, 734; 29 R. 1833). On the evening of the 4th, Palermo

and Sica called and tried to arrange another meeting with Leonard (22 R. 736-737).

After Nesseth left the office on May 4, he communicated with the Los Angeles police (29 R. 737-738). That evening, the police, with Leonard's consent, recorded a telephone call that Palermo made to Leonard's home (60 R. 6708-6711, Ex. 177). In this conversation, Leonard told of his efforts to influence Nesseth to agree to a Jordan-Hart or Flanagan fight. Palermo said that he had received a message from "our friend" and that he had to call Gibson that evening. Palermo suggested that Leonard come to a restaurant where they could both telephone Gibson. He also said that "Joe" would be there and that William Daly and Gibson planned to take over the Hollywood Boxing Club. When Leonard referred to the hostile call that he had recently received, Palermo started to explain the call but changed his mind (65 R. 7547-7554).

On May 6, Palermo, Sica, and Nesseth met at Leonard's office. Leonard confirmed that he had acknowledged their arrangement with Jordan before "the man" in Miami. Palermo unsuccessfully attempted to persuade Nesseth to agree to a Jordan-Hart match. Nesseth urged a meeting with Gibson and an effort was made to reach him by telephone.[3] That evening, Palermo who had been arrested at the airport by Los Angeles police, denied that he had seen Sica or

---

[3] This conversation, recorded by the Los Angeles police, was admitted into evidence without exception by petitioners (32 R. 2334-2338, 2417-2418, 2426-2428; 33 R. 2442-2444).

knew Dragna (58 R. 6217-6218). The next day, Leonard reported to Gibson that Nesseth still refused to match Jordan against Hart (28 R. 1692).

On May 11, 1959, Gibson and William Daly, charged in the indictment as a co-conspirator but not indicted, flew to Los Angeles. Gibson left word with Leonard, who was not in the city, that since he himself had to leave Los Angeles, he was leaving Daly to straighten the matter out (22 R. 750-751).

On May 13, Daly advised Leonard that he was "in a jam," that Norris, Gibson, Carbo, and Palermo were upset. Daly said that if Leonard had talked with him rather than Palermo, Daly would have talked to Carbo and Leonard would not have had to pay any money except on big fights. Daly said that if Leonard could straighten Nesseth out, it might be possible to obtain money to continue operating the Hollywood Boxing Club (22 R. 751-754).

On May 14, 1959, Leonard was invited to Daly's hotel room (*ibid.*) Before going, Leonard was fitted with a minifon recording device and a portable radio transmitter by the Los Angeles police (32 R. 2339-2349). Daly told Leonard that he did not know what he could do for him, that some night Nesseth or he might "hear bang, bang, bang" and either one of them could be dead or hurt; that Ray Arsel who had worked for Carbo had been hit in the head with a pipe. Daly suggested that the best thing to do was to match Jordan with Hart (22 R. 755-761; 6 R. 1357-1413). Recordings of this conversation, made both by the minifon and through the transmitter, were introduced into evidence (32 R. 2343-2344, 2359-2361;

33 R. 2507, 2518-2521, 2525-2527; 60 R. 6696-6702). Prior to admitting the first recording, the court gave the jury a cautionary instruction upon its use (33 R. 2510-2513).

ARGUMENT

1. All petitioners other than Gibson complain that the judge failed to instruct the jury that it should not consider the declarations of one conspirator against a co-conspirator until and unless it was satisfied by independent evidence that the alleged co-conspirator was indeed a member of the conspiracy.

In its general charge, the court stated that "it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such." (66 R. 7654). The judge added that the doing of an overt act was insufficient in itself to authorize conviction but that it was "necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out", and further that there "must be intentional participation in the transaction with a view and purpose to further the common design." (66 R. 7654-7655). The charge continued (66 R. 7655-7656):

> Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made there-

> after pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators may be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

In ruling on exceptions to the instructions, the court recalled that it had inadvertently omitted instructions offered by petitioner Gibson (66 R. 7713). It then charged the jury (66 R. 7714):

> The question of the guilt or innocence of any defendant must be determined from the evidence which relates to him and must not be controlled or affected by testimony which relates only to other defendants

The court instructed that in considering the guilt or innocence of petitioner Gibson the jury "may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy"

(66 R. 7714-7715). Following the charge, Palermo asserted that Gibson's instruction applied to him and Carbo stated it applied to all defendants. His exception was that the "declarations of the acts of a co-conspirator can't be used to establish a conspiracy. It must be proved by independent evidence. Membership in a conspiracy cannot be proved by declarations, that must be proved by independent evidence." The court responded that it believed this matter was covered in the instructions. Carbo did not think the court had mentioned it but acknowledged he might be mistaken. The prosecutor thought that a full instruction had been given upon the subject. The court then declared that it thought its previous instructions were adequate (66 R. 7719).[4]

There is no doubt that the instruction given as to Gibson is customarily given in conspiracy cases, whatever the nature of the conspiracy charged. See e.g., *Glasser* v. *United States*, 315 U.S. 60, 74. It is

---

[4] The various defendants had offered proposed instructions which would have told the jury that before finding a particular defendant was member of a conspiracy, it must find beyond a reasonable doubt that a conspiracy existed and that membership of a particular defendant must be established "without regard to, and independently of, the statements, acts, and declarations of others in his absence." (3 R. 644); that this connection must be established beyond a reasonable doubt by a defendant's own conduct and statements (3 R. 647). Another instruction would have told the jury that the existence of the conspiracy must be established by independent proof based upon a particular defendant's own acts, conduct and declarations (3 R. 646). Another instruction said that in determining whether a person was a conspirator, the jury was not to consider what others have said or done (3 R. 714). See Carbo Pet. 71-73.

unnecessary to agree with the Court of Appeals that such an instruction would *always* be meaningless in a conspiracy case. But we do submit that here such a charge, particularly in relation to the petitioners other than Gibson, would have been largely meaningless and might well have been confusing. That is because, in this case, declarations were the very object of the conspiracy, so that proof of declarations was proof of the conspiracy itself.

Our point is best illustrated by considering the difference between the offense here charged and a conspiracy to commit a common type of crime, such as operating an illegal still. In the latter situation, the object of the conspiracy is an act which does not in itself involve any declaration, and the nature of the conspiracy can be, and usually is, established by showing acts, rather than declarations, such as the finding of the still or the supplies for a still. The participation of conspirator in the enterprise is shown by what he did, as, for example, delivering sugar to the site of the still. In that type of situation it may be meaningful to tell a jury that they must first determine the nature of the conspiracy from evidence other than hearsay statements; that they must determine from independent evidence whether each defendant was a member of the conspiracy; and that only then should they consider against him declarations made by co-conspirators in furtherance of the conspiracy outside of his presence.

But in this case, the object of the conspiracy was to make declarations—threats—and the nature of

the conspiracy could only be established by proving the threats. In short, the declarations were not incidental to the conspiracy charged; they were the heart of it, so that the conspiracy as such could not be shown without showing the declarations. The declarations were verbal acts, as significant to the nature of the crime here charged as the act of taking money would be on a charge of conspiracy to rob a bank. See Wharton, *Criminal Evidence* (12th ed.), par. 257. Under these circumstances, it would not have been accurate to tell a jury generally that no declaration by anyone could be considered against those not present for any purpose until after the jury had found that each individual was a member of the conspiracy. Under the general rule that any relevant evidence, including the overt acts of defendants, may properly be considered by the jury in determining the existence of any underlying purpose or plan,[5] the significant declarations in this case could properly have been considered by the jury as proof of the nature of the conspiracy. Such declarations are not hearsay.[6] In that situation it would only be confusing and serve no real purpose to tell a jury that they could consider the threatening declarations against all defendants for the purpose of estab-

[5] See e.g. *United States* v. *Morris*, 225 F. 2d 91, 95-96 (C.A. 7), certiorari denied, 350 U.S. 901.

[6] Cases such as *Lutwak* v. *United States*, 344 U.S. 604 and *Delli Paoli* v. *United States*, 352 U.S. 232, are not in point. Not only do they involve utterances made subsequent to the termination of a conspiracy but they are concerned with hearsay declarations.

lishing the nature of the conspiracy but that they could not consider the same declarations against non-declarants until they found the non-declarant to be a member of the conspiracy.

The requested instruction would have been particularly meaningless in this case with respect to the petitioners other than Gibson because each one of them did personally make one or more of the declarations which were the verbal acts manifesting the conspiracy, and there is no doubt that the jury so found. As to Carbo and Palermo, the jury found each guilty, not only of the conspiracies charged but of the substantive offenses in which each was named. Each of the substantive offenses was narrowly drawn, limited to a particular charge against one individual based on a specific conversation on a particular date, except Count 4 which charged Palermo and Sica with the May 6 conversation in which they jointly participated. The jury therefore necessarily found that Carbo and Palermo each made the specific threat attributed to him personally. As to Sica, the evidence which connected him with the conspiracy were his threats so that the jury had to find he made the threats to hold him in the conspiracy at all. As noted

---

Petitioners' arguments relate to the significant threatening declarations. Neither in the instructions offered, nor in their exception, did they pinpoint any particular conversation which might not fall in this category and which would obviously be insignificant in the light of the facts proved. The court did instruct the jury during the testimony of Leonard that a telephone conversation between Palermo and Leonard in August 1959 should only be considered against Palermo unless it proved any other defendant to be a conspirator (28 R. 1664-1665).

supra, the judge did make it clear that each individual defendant must be found to have joined the conspiracy.

2. The recording of Leonard's conversation with Palermo, obtained by an induction coil on the telephone (see *supra*, p. 10), was played for the jury during the government's case in rebuttal (61 R. 6727) to contradict testimony that Palermo had given on cross-examination (56 R. 6043-6046). It was introduced only after Palermo himself had brought into the case his own recordings of telephone conversations between himself and Leonard (27 R. 1568, 1576; 28 R. 1646-1647, 1652-1653, 1655; 37 R. 3058). All the petitioners contend (No. 141, Pet. 16-20; No. 122, Pet. 5-8; No. 145, Pet. 23; No. 134, Pet. 19) that the telephone recording made in Leonard's home, with Leonard's consent, was inadmissible as in violation of the Federal Communication Act and the Fourth Amendment. They argue that there is a significant difference between hearing a conversation on a regularly used telephone extension and recording a telephone conversation from a single telephone by means of an induction coil.

Listening in to a telephone conversation, with the consent of one of the parties is not, however, either a breach of privacy or a violation of the Communications Act. There is, in our view, no significant difference between this case and *Rathbun* v. *United States*, 355 U.S. 107. The basic rationale of *Rathbun* is that listening in to one end of the conversation is not an "interception" under Section 605 and that neither party to a conversation can prevent the other from disclosing the conversation. Thus, the determina-

tive fact is whether the consent of one party has been obtained. Whether the disclosure occurs contemporaneously with the conversation (as when a living person listens), or later (as here), when the recording is played, is of no significance so long as the disclosure is authorized. Nor is there any reason why the number of telephones of the party making the disclosure, or the mechanical method by which the authorized disclosure is made, should affect the basic rule. The fact that a mechanical recording may be more reliable than a living witness to a telephone conversation is not a valid basis for distinguishing this case from *Rathbun*. See *Carnes* v. *United States*, 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861. See also *Hall* v. *United States*, 308 F.2d 266 (C.A. 5), certiorari denied, 371 U.S. 952; *United States* v. *Williams*, 311 F.2d 721 (C.A. 7), certiorari denied, June 10, 1963.

This is not a case where the recording is used as a substitute for the testimony of live witnesses. Both Leonard and the police officer who made the recording possible testified for the government and could have been examined as to all circumstances leading up to the use of the recording device. Compare *On Lee* v. *United States*, 343 U.S. 747, and the opinion of the Chief Justice, concurring, in *Lopez* v. *United States*, No. 236, 1962 Term, decided May 27, 1963. This case also differs from *Ferguson* v. *United States*, 307 F. 2d 787 (C.A. 10), certiorari granted, June 10, 1963. There the issue is whether intrastate telephone messages, deemed by the State a violation of state statutes, are admissible in a federal court. No claim is made that the recording

here violates state law. Nor is there any issue here of the violation of federal so-called "beep beep" regulation. The tariff regulations covering recording devices claimed to be violated are applicable only to interstate telephone calls, not to intrastate calls such as the one here involved. See *In the Matter of Use of Recording Devices in Connection with Telephone Service*, 11 F. C. C. 1033, 12 F. C. C. 1005. Nor, finally, does this case give occasion for reexamination of *Olmstead* v. *United States*, 277 U.S. 438, where eavesdropping on a telephone conversation without the consent of either party was held not to violate the Fourth Amendment. Here there was no invasion of privacy because a party to the conversation, who could himself testify to the conversation, consented to have it recorded.

3. Petitioners also attack the admissibility of the recordings of conversations between Leonard and unindicted co-conspirator Daly on May 14 in the latter's hotel room, to which Leonard had been invited (No. 141, Pet. 21-22; No. 122, Pet. 8-9; No. 145, Pet. 23, 28; No. 134, Pet. 19). The recordings were made with the use of two instruments carried on Leonard's person, a minifon recording device and a radio transmitter which carried the conversation into a receiver and a recorder in a neighboring room. On that issue this case is governed by *Lopez* v. *United States*, No. 236, 1962 Term, decided May 27, 1963. As in *Lopez*, one of the parties to the conversation, Leonard, testified as a government witness to his recollection of the conversation.[8] Leonard

[8] Daly, the other party to the conversation testified as a defense witness. He gave his version of the conversation,

had been invited to Daly's room and Daly's communications to him were not privileged. There is no question here, as in *Massiah* v. *United States*, No. 199, this Term, as to the admissibility in evidence of a recording of a conversation with a defendant made, in the absence of his attorney, for the purpose of securing admissions, after he has been enlarged on bail pending trial.[9]

4. Petitioner Gibson (No. 145) was not denied an opportunity to show that Negroes were excluded from the jury which tried him. The issue arose when no Negroes appeared among the 50 prospective jurors summoned on the panel to hear the case. Gibson claimed that the 1960 census reports would show that such a panel could not have resulted in the absence of discrimination. Specifically, he offered to show: (1) the 1960 census population statistics by race; (2) the areas where Negroes commonly resided in the district; (3) the methods used to select juries in the district and (4) the racial content of the particular panel (17 R. 89). The clerk and his jury assistant were called by the court. They testified that the bulk of names of prospective jurors came from telephone directories on a mechanical basis and that other names were obtained from the jury commissioner, judges and former jurors. They also related that the questionnaires used did not indicate race and that the names called for this case had been drawn blindly. Gibson declined to question the clerks, giving as his

---

claiming that the recording did not cover the entire conversation (38 R. 3126-3131; 39 R. 3286-3288, 3292-3299).

[9] Since Daly's rights were not violated, it is not necessary to discuss the standing of petitioners to object to the recordings. Cf. *Jones* v. *United States*, 362 U.S. 257, 261; *Goldstein* v. *United States*, 316 U.S. 114, 119-122.

reason his objections to the procedure adopted by the court (17 R. 89-96).

The trial court explored the issue sufficiently. The investigation it conducted revealed that racial considerations played no part in jury selection and that the bulk of jurors were selected by chance from telephone directories in the Los Angeles area. It was petitioner's duty in the first instance, if he was serious in his contention, to probe the mater as fully as possible with those persons charged with the duty of jury selection. Failing to do this, he is in no position to complain of the uncontradicted evidence that race played no part in the jury composition. The fact that a particular jury panel contains no Negroes or has a percentage of Negroes less than the percentage of Negroes in the population of a district is not in itself a basis for quashing a jury panel. See *Akins* v. *Texas*, 325 U.S. 398.

5. The indictment, in charging conspiracy to obstruct commerce by extortion, and to transmit threatening communications, alleged that Carbo and Palermo used petitioner Sica and defendant Dragna, known to have underworld reputations, to communicate with Leonard and Nesseth (1 R. 2-4, 9-11). The evidence showed that, after Carbo threatened Leonard with physical harm and told him that he was going to send someone to take care of him, Sica appeared and informed Leonard that he was in trouble and could get hurt; that subsequently Dragna warned Leonard to agree to Palermo's demands or he might be in trouble. Leonard testified that he was frightened of the two men because of their underworld reputations and Nes-

seth also testified as to the reputation of the men (22 R. 722, 734; 29 R. 1865-1866). When the court first admitted this testimony, it told the jury that a bad reputation might or might not be deserved and that the jury must determine if Leonard was afraid and if the situation was "reasonably calculated to produce" fear (22 R. 722-724). At the close of the case, the court charged that this evidence was admitted to show the state of mind of Leonard and Nesseth (66 R. 7698-7699, 7706-7708).

The evidence was properly admitted for the limited purpose for which it was offered, to show the state of mind of the persons threatened. *Callanan* v. *United States*, 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862. Soft words by a person of power can be more threatening than big talk by a weak and ineffective individual. Thus it was proper to show that Carbo and Palermo attempted to play on Leonard's fears by sending two individuals whose presence, coupled with threats, could compel compliance with their extortionate demands.

6. Complaints of various other rulings at the trial are without merit.

(a) Petitioners assert error in testimony by Nesseth and Jack McCoy that Leonard told them of Carbo's threats (No. 141, Pet. 27-28; No. 134, Pet. 25-26). This testimony was admissible to show Leonard's state of mind. *United States* v. *Varlack*, 225 F. 2d 665, 673 (C.A. 2). If the petitioners wished this testimony to be limited, it was incumbent upon them to offer such an instruction.

(b) On direct examination Leonard testified that in October or November 1959, he had received a message from his wife (who had gone to Philadelphia) to telephone Palermo, and that he had not authorized his wife to contact Palermo. On cross-examination, the defense developed the fact that Leonard had been willing to accept $25,000 from Palermo in order to flee the country and avoid testifying (25 R. 1265), and introduced tape recordings of some telephone conversations between Palermo and Leonard (28 R. 1653-1655). In closing argument, the prosecutor conceded that Leonard and his wife had decided prior to her trip to Philadelphia that if Mrs. Leonard obtained some money from Palermo, Leonard would attempt to leave the country (63 R. 7055). Subsequently, in closing argument, the prosecutor stated that he did not apologize for Leonard who was the victim of circumstances and that "there has been no effort to bring before you the testimony of a perjuror" (65 R. 7529). Petitioners claim (No. 141, Pet. 29-30; No. 134, Pet. 26; No. 145, Pet. 26-27) that they were denied due process because the prosecutor did not concede before the jury that Leonard had been impeached and because he argued before the successor judge that Leonard was "completely truthful" (67 R. 7950).

The prosecutor's statements obviously referred to Leonard's testimony as a whole. The fact that Leonard may have been inconsistent in some of the details of his testimony did not compel the prosecutor to concede that he had been impeached or was not worthy of belief. This is not a case where important facts were

hidden from the jury. The false statement of which petitioners complain was brought to the attention of the jury, and such inconsistencies were for the jury in their appraisal of the testimony.

(c) After the defense had developed the discussions as to the $25,000 offer to Leonard, the government brought out the fact that Leonard had received telephone calls between May 20 and November 1959, which had frightened him. In one call, in August 1959, Palermo told him that he should change his mind about the case and that there would be money waiting for him. The contents of the other calls were not introduced (28 R. 1657-1667). Contrary to petitioners' contention (No. 141, Pet. 28, 30-31; No. 134, Pet. 27), this evidence was admissible to show that Leonard was motivated by fear when he offered to flee the country.

Chargin, a boxing promoter, had negotiated with Leonard to take over the operation of the Hollywood Boxing Club (31 R. 2225-2226). After the meeting on May 6, Sica asked an assistant to Leonard where he could reach Chargin (31 R. 2206). On June 4, the day before he planned to fly to Los Angeles, Chargin received a telephone call in which the caller, who knew his flight number, advised him to stay out of Hollywood and told him "You saw what happened to Jack Leonard" (31 R. 2239). As the court below ruled, the trial judge had discretion to admit this conversation as bearing on the general atmosphere of fear that pervaded the actions in this case. In any event, this minor shred of evidence, even if improper, could not have affected the outcome of this long trial.

(d) Sica's defense witness, Tom Stanley (Salvatore Casarona), a boxing manager and promoter, testified that in early 1960 Leonard mentioned his wife's visit to Palermo and asked Stanley to act as an intermediary to obtain the money from Palermo so that Leonard could leave the country (36 R. 2864-2865). In rebuttal, Leonard testified that, a number of times after the May 6 meeting, Stanley told Leonard that he should not ally himself with Nesseth (59 R. 6355-6358, 6373). Twice in the middle of June 1959, Stanley came to Leonard's office with one Calla. When Leonard asked who Calla was, Stanley replied that he was a friend of Sica who had been convicted of murder (59 R. 6361-6367). In late 1959, Stanley, after referring to the Philadelphia visit of Leonard's wife, told Leonard that he could obtain a large sum of money for Leonard if Leonard could clear all the defendants and Leonard agreed to give Stanley a percentage (59 R. 6374-6383).

Petitioners claim error in the admission of Leonard's testimony about Calla (No. 141, Pet. 33; No. 134, Pet. 27-28). However, as with respect to the telephone calls to Leonard, the relationship with Stanley, including the conversation about Calla, showed a constant, although subtle, pressure on Leonard. The jury was entitled to consider this evidence in determining Leonard's motives in seeking to avoid testifying.

(e) Sica, who testified in his own behalf, admitted on direct examination that he had been convicted of two felonies (52 R. 5357). On cross-examination, the government brought out a third felony conviction (52

R. 5363). The prosecutor then asked him if he had been convicted of a conspiracy to violate a particular section of the California Penal Code, basing the question on the fact that his exemplified copy of the judgment showed that the crime was a felony, and that, in any event, the conviction was for a crime involving moral turpitude. The court determined that this was not a proper conviction for impeachment purposes and instructed the jury to disregard the question (52 R. 5363-5372). A motion by Sica for a mistrial was denied by the court (52 R. 5408-5414). Its exercise of discretion in this respect presents no issue warranting review.

(f) Gibson claims (No. 145, Pet. 29-30) that, as a matter of law, he should have been acquitted because his conviction is based on the declarations of his co-conspirators. The evidence shows, however, that Gibson was informed of the threats made by the others, and that he knowingly gave his "informed and interested cooperation" to furthering the conspiracy. See *Direct Sales* v. *United States*, 319 U.S. 703. The jury thus had ample basis to hold him liable as a conspirator.

7. Various claimed errors in the instruction are without merit.

(a) Gibson (No. 145, Pet. 26) claims that the court erred in failing to give his requested character instruction (instruction F) which would have told the jury "that an established reputation for good character alone may create a reasonable doubt" as to his

guilt. The court did instruct the jury that reputation evidence has great value in certain cases, and that the jury should consider whether a person having a reputation such as Gibson would commit the type of offense charged (66 R. 7695-7699). After the court gave its instructions, Gibson renewed his request for 11 of the special instructions that he had requested. He did not, however, renew his request for the reputation instruction which he had offered (66 R. 7729).

We submit it would be unrealistic to instruct the jury that a reputation for good character should alone generate a reasonable doubt in all circumstances. The nature of some crimes is such that they are frequently committed by persons of previously impeccable reputation. It is for the jury to decide whether the crime is such that it might be committed by a person of good reputation and to decide what weight to give to the reputation of the defendant in the light of all the circumstances in the case.

There is, it is true, a conflict in the circuits as to whether a court must in every case charge that good character alone may create a reasonable doubt, but this Court has not heretofore regarded this conflict as of sufficient importance to require resolution. See *e.g. Moore* v. *United States*, 254 F. 2d 213 (C.A. 5), certiorari denied, 357 U.S. 926; *Poliafico* v. *United States*, 237 F. 2d 97, 114 (C.A. 6), certiorari denied, 352 U.S. 1025; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C.A. 8), certiorari denied, 315 U.S. 800. In

this case, the charge actually given was justified in relation to the facts at issue.[10]

(b) Petitioners argue (No. 122, Pet. 9-10; No. 141, Pet. 32-33) that there was plain error in the court's instructions because there was "a studied and conscious effort to avoid the words 'not guilty' and 'acquit' ". If petitioners thought the jury listening to the charge would be left with such an impression, they should have brought the matter to the court's attention in their exceptions. A reading of the charge as a whole indicates that it is not weighted for a finding of guilt (66 R. 7634-7704).

(c) There is likewise no plain error in the court's instructions as to an appeal (No. 141, Pet. 33). The court made it clear that the jury's findings of fact were not subject to review (66 R. 7635).

8. The trial in this case lasted from February 20, 1961, until May 30, 1961. After the jury returned its verdict the trial judge, Judge Tolin, denied as to petitioners[11] the motions for judgment of acquittal

---

[10] Gibson's contention that he was prejudiced because his counsel was not apprised of the instructions prior to argument is without merit (No. 145, Pet. 25). He was not misled by the character instruction given. The court had advised Gibson that it would give an instruction on character evidence but not in the language offered (61 R. 6784-6785). The court, while rejecting all instructions tendered as being prolix, did tell counsel that if they would pull out the few instructions they particularly wanted, it might give them and would so inform counsel (61 R. 6786-6793).

[11] The court stated it wished to examine the evidence as to Dragna and expressed a possibility that his motion might be granted (66 R. 7805-7807).

as to which he had reserved decision. The successor judge, who made a nine volume abstract of the trial testimony (8 R. to 16R), denied post-trial motions for a new trial which alleged, *inter alia*, that the verdict was contrary to the weight of the evidence (4 R. 962, 965, 978; 6 R. 1446, 1491).

Neither the conflict in the testimony nor the fact that Gibson, Sica and Palermo testified and denied their guilt makes it mandatory, or an abuse of discretion, as petitioners contend (No. 141, Pet. 13-16; No. 134, Pet. 17-18; No. 145, Pet. 30-34) for a successor judge to act on their motions for a new trial. It is the function of the jury, rather than the trial judge, to weigh the evidence, and particularly to judge the credibility of witnesses. A trial judge would be justified in taking the issue of credibility from a jury, if at all, only in the situation where the witnesses for the government had been so completely discredited that no reasonable man could believe them. That was not this case, and the trial judge who heard this case obviously did not think so since he had already denied the motion for acquittal.[12]

---

[12] In *Connelly* v. *United States*, 249 F. 2d 576 (C.A. 8), certiorari denied, 356 U.S. 921, which has a dictum upon which petitioners rely, the trial judge had not at the time of his death ruled upon the motion for judgment of acquittal filed at the close of all the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JULY 1963

☆ U. S. GOVERNMENT PRINTING OFFICE, 1963 694454 48

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 30 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 122.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 122.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

A relatively short reply will serve to demonstrate the obvious infirmities of the Government's brief in this case.

I.

The Government on page 19 of its brief stated that this case *differs* from *Ferguson v. United States*, 307 F. 2d 787 (C. A. 10), certiorari granted, June 10, 1963, Docket No. 198 Oct. Term, 1963, in that "There the issue is whether *intrastate* telephone messages, deemed by the State a violation of state statutes, are admissible in a federal court." This is incorrect. There were chiefly two relevant questions presented in the petition for certiorari, namely, does Oklahoma statute barring attachment of recorder to telephone extension prevent federal prosecutor's use of evidence obtained through such device; and does recording of telephone conversation by use of such device violate § 605 of Federal Communications Act.

This Court granted the petition for a writ of certiorari but did *not* limit the grant of certiorari to "whether intrastate telephone messages, deemed by the State a violation of state statutes, are admissible in a federal court," as suggested by the Government in its brief.

The real difference between this case and *Ferguson, supra*, is that a greater variety of electronic devices were here used to surreptitiously gather evidence against the petitioner and his co-defendants.

II.

A. In *Benanti v. United States*, 355 U. S. 96, at page 106, footnote 19, this Court stated "Schwartz v. Texas, 344 U. S. 199, 97 L. ed. 231, 73 S. Ct. 232, *supra*, is not to the contrary. While it refused to overturn a state rule of evidence, the Court was *satisfied that the action of the state officials nonetheless violated* § 605. 344 U. S. at 202." (Emphasis supplied.) Here the state police officer and Leonard, the prosecution witness, did to Palermo exactly what the state police officer and Jarrett did to Schwartz, in *Schwartz v. Texas, supra*. In *Schwartz v. Texas*, 344 U. S. 199, the Court was at pains to note (p. 201) that "the intercepted calls would be inadmissible in a federal court," and that "this is true even though the communications were intrastate telephone calls."

B. When Congress in § 605 said "no person" shall intercept and divulge it meant "no person". *Nardone v. United States*, 302 U. S. 379; *Nardone v. United States*, 308 U. S. 338; *Weiss v. United States*, 308 U. S. 321.

Rathbun v. United States, 355 U. S. 107, did not overrule the above cited cases and modify § 605 to read that *interception* and divulgence may be made by the auditor.

Both in space and time this interception was before the arrival of the communication to the auditor. The Government in its Brief in Opposition never denied that there was an interception and divulgence in this case.

Palermo's own recordings of telephone conversations between himself and Leonard (referred to in the Government's Brief, page 18) were legally made in November, 1959, *after* he was indicted on September 12, 1959, *only* to show that Leonard was demanding money (Defendants' Exhibits C, D and E) and were played *without objection* during the cross-examination of Leonard. The telephone recording used by the Government which was obtained by a police induction coil interception was *not* played during the cross-examination of Palermo but was saved to be offered as independent evidence in the Government's case in rebuttal over objections by indeed all the petitioners in this case.

The concession in *Rathbun* by the *parties* to *that* suit "that either party may *record* the conversation and publish it," 355 U. S., at 110 (emphasis added), contemplates a *legal* recording and not one made in violation of the law. Here, admittedly, the police, not the party, recorded the conversations by an illegal interception.

III.

A. In *Lopez v. United States*, 83 S. Ct. 1381, the evidence disclosed that Lopez knew he was talking to a government agent but he did not know that the conversations were being recorded. In this case, just as in *On Lee v. United States*, 343 U. S. 747, which we submit should be overruled, petitioner did not know that the police were recording his telephone conversations with Leonard, who was not a government agent.

The supervisory power of this Court is invoked, if necessary, to exclude from federal criminal trials the *use* of recordings surreptitiously obtained by electronic interceptions of "friendly" conversations to be played to the jury, who are told by the judge that the recordings are "expurgated" with the "obscenities left out" (66R. 7759), or to be used by government counsel in rebuttal or in their final argument to the jury.

Courts now will instruct the jury that they will have a technician available to play recordings to the jury (66R.

7703). Almost the last words the jury heard was the playing of the Palermo-Leonard telephone conversation (66R. 7760).

This new technique of recordings being the last words the jury hears, even after the court's charge, threatens to shift and undermine the entire trial practice as we now know it.

B. Petitioner has a standing to object to the various other electronic recordings involving co-conspirators whether they were indicted or unindicted. *Jones v. United States*, 362 U. S. 257.

IV.

Petitioner had in his petition, pages 9 and 10, argued that the trial judge should have instructed the jury, as requested, that if essential facts were not found the verdict must be "not guilty." The Government in its brief, at page 29, argues that this should have been brought to the trial court's attention by exceptions. *It was.* At the trial after the charge exceptions were taken (66R. 7713). See *Roberts v. United States*, 284 F. 2d 209 (D. C. Cir. 1960).

Indeed, the court below in its opinion (Petitioner's Appendix A, 44a, 45a) stated that because of the failure of the trial judge to inform counsel on their points for charge before argument that "the petitioners should not be foreclosed from asserting error in the charge."

Conclusion.

For the foregoing additional reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

July, 1963.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963
No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply of Petitioner Paul John Carbo to Brief for the United States in Opposition.

WILLIAM B. BEIRNE,
408 South Spring Street,
Los Angeles 13, California,

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases	Page
Abrams v. United States, 250 U. S. 616	3
Berger v. United States, 295 U. S. 78	2
Callanan v. United States, 223 F. 2d 171, cert. den. 350 U. S. 862	4
Ferguson v. United States, certiorari granted, No. 198	3
Glasser v. United States, 315 U. S. 60	1
Jones v. United States, 362 U. S. 257	2
Lopez v. United States, 373 U. S. 427	2, 4
Massiah v. United States, certiorari granted, No. 199	4
People v. Ketchell, 59 A. C. 524, 30 Cal. Rptr. 538, 381 P. 2d 394	6
Rathbun v. United States, 355 U. S. 107	2, 3
Rees v. United States, 95 F. 2d 784	6
United States v. Atlantic Refining Co., 360 U. S. 19	3

IN THE

Supreme Court of the United States

October Term, 1963
No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Reply of Petitioner Paul John Carbo to Brief for the United States in Opposition.

1. The very distinction sought to be drawn by respondent as to the co-conspirator declaration question, demonstrates the necessity for the grant of certiorari (Reply to Respondent's Point 1, pp. 12-18).

Respondent's concession (p. 14) that the instruction requested by petitioner, but not given as to him, "is customarily given in conspiracy cases, whatever the nature of the conspiracy charged," (Citing *Glasser v. United States,* 315 U. S. 60, 74) and the distinction it seeks to make (p. 15) between the conspiracies charged in this case and other conspiracies, are, we submit, ample reason for certiorari to be granted. Respondent agrees with petitioner (Petition, p. 9) that the failure to instruct as requested is contrary to the rationale of this Court's decision in *Glasser* and that the point has not been decided. That the question involved is important, cannot be gainsaid.

Petitioner does not agree that the distinction respondent seeks to draw is a valid one, nor that hearsay suddenly, somehow, ceases to be hearsay. But those are questions which should be decided by this Court after briefing and argument; they should not be left in limbo by the summary denial of certiorari.

2. The induction coil issue in this case warrants the grant of certiorari (Reply to Respondent's Point 2, pp. 18-20).

In *Rathbun v. United States*, 355 U. S. 107, the Government made a definite distinction between a conversation overheard on a regularly installed telephone and one overheard by means of an instrument specially installed to hear a particular conversation (See Petition in the instant case, pp. 17-19). That argument apparently persuaded this Court to decide *Rathbun* as it did (355 U. S. at 107 and 111). The distinction drawn by the Government in *Rathbun* is one which was clear to Mr. Justice Brennan and the other Justices concurring with him, dissenting in *Lopez v. United States*, 373 U. S. 427, 453.

But here the Government says (Br. in Opp. 18, 19), "there is, in our view, no significant difference between this case and *Rathbun v. United States*, 355 U. S. 107 . . . there (is no) reason why . . . the mechanical method by which the authorized disclosure is made, should affect the basic rule." We submit that the Government should not be permitted to cut the cloth to fit the needs for winning a case (*cf. Berger v. United States*, 295 U. S. 78, 88). Important constitutional rights should not thus be watered down to suit the Government's convenience at the time (*Cf. Jones v. United States*, 362 U. S. 257, 263: "to hold

to the contrary . . . would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." See also, *United States v. Atlantic Refining Co.*, 360 U. S. 19, 23-24).

In any event, the distinction made by the Government in *Rathbun* is presented in the case at bar. Certiorari should be granted to determine whether it is a valid one.

Respondent seeks (Br. 19) to differentiate the present case from *Ferguson v. United States*, certiorari granted, No. 198, this Term, on the basis that induction coil listening under Oklahoma state law is illegal. We fail to see what difference it could make to this Court in adjudicating the admissibility of evidence in the federal courts, whether the state considers the conduct to be a violation of its law. But if that distinction made by respondent is sufficiently critical "to turn the color of legal litmus paper" (Mr. Justice Holmes, dissenting, in *Abrams v. United States*, 250 U. S. 616, 629), it is another reason for certiorari's being granted. If the distinction be a good one, a proposition with which petitioner does not agree, the decision that this is so should be made after briefing and argument and not by denial of a hearing.

3. The surreptitious use of the electronic wire recorder and radio transmitter warrants a hearing by this Court (Reply to Respondent's Point 3, pp. 20-21).

Respondent is incorrect, we submit, in its assertion (Br. 20) that "on that issue this case is governed by *Lopez v. United States*." (373 U. S. 427). As pointed out in our Supplement to Petition for Writ of Certiorari (pp. 8-14), that case augurs for the grant of certiorari, not for denial.

As to *Massiah v. United States,* certiorari granted, No. 199 this Term, it is true that there is a distinction between that case and this one in that the surreptitious electronic overhearing there was after the defendant had been charged and had retained an attorney. But the distinction is not one which has been the basis of decision by this Court, though it does seem to be of concern to the Chief Justice (*cf. Lopez v. United States,* 373 U. S. 427, 444, f.n. 1). As to whether the distinction is decisive, is, therefore, an open question which should continue to be open until the instant case has been briefed and argued.

Whether the electronic eavesdropping occurs prior or subsequent to the institution of a prosecution should make no essential difference; the inroad into privacy is as bad whether before or after. Indeed, it could cogently be argued that after a prosecution begins, the individual is more likely to be on his guard and, hence, more discreet. In any event, the supposed distinction, rather than suggesting the denial of certiorari, suggests the propriety of a hearing by this Court.

4. The "underworld reputations" charges in the indictment and the evidence concerning those charges admitted at the trial, require the granting of certiorari (Reply to Respondent's Point 4, pp. 22-23)

Respondent does not dispute petitioner's assertions (Pet. 26) that the question has never been decided by this Court[1] nor that the issue is an important one. Whether an indictment so drawn should be permitted to stand and whether evidence concerning a defendant's

[1]Nor any other court. *Callanan v. United States,* 223 F. 2d 171 (CA 8 1955), cert. den. 350 U. S. 862, cited by respondent (Br. 23), was not a reputation case.

reputation should be allowed as a part of the prosecution's case in chief,[2] particularly as used against this petitioner with no evidence that he even knew of the alleged reputations of Sica and Dragna, are matters which should be decided by this court on review, not by denial of certiorari.

5. Respondent's Points 6 (Br. 23-27) and 7 (Br. 27-29) are answered in the Petition (pp. 27-33) where the unfairness of the trial afforded this petitioner is demonstrated and wherein is shown, we submit, the necessity for the exercise of this Court's power of supervision.

6. The Rule 25 Point in the case merit this Court's review (Reply to Respondent's Point 8, pp. 29-30).

Here, again, respondent does not take issue with petitioner's assertions (Pet. 13) that the question presented has not been passed upon by this Court and that the matter is of obvious and recurring importance. Respondent's argument is that (Br. 30), "it is the function of the jury, rather than the trial judge, to weigh the evidence, and particularly to judge the credibility of witnesses." But this does not meet the point involved, nor offer a reason as to why this Court should not hear the case.

The statement by respondent fails to give effect to the duty of the judge in passing upon a motion for new trial. At that stage of the proceedings the judge exercises a function quite different from that which he exercises when considering a motion for acquittal prior to the submission of the case to the jury. In ruling on

---

[2]Respondent has ignored petitioner's argument (Pet. 24-26) based on the vagueness of the word "underworld".

a motion for new trial he is not "taking the issue of credibility from the jury"; (Resp. Br. 30) the jury has already fulfilled its function. "[A] defendant is entitled to two decisions on the evidence, the second by the trial judge in his consideration of a motion for a new trial. . . . On such a motion it is the trial court's duty to review the evidence and to determine whether in its judgment the weight of the evidence supports the jury's verdict. . . . In performing that duty the trial court must '". . . judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. . . .'". . . ." (*People v. Ketchell,* 59 A.C. 524, 566, 30 Cal. Rptr. 538, 561-562, 381 P. 2d 394, 417-418). "Under these fundamental and elementary principles, invariably governing the administration of criminal law in our courts, the accused, . . . (i)n effect . . . has a trial by the judge in addition to the trial by the jury." (*Rees v. United States,* 95 F. 2d 784, 790-791 [CCA 4 1938]). That additional trial was denied petitioner here. Certainly, the issue warrants review.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM B. BEIRNE,
A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 20 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963
No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

ROBERT W. KENNY,
1557 Beverly Boulevard,
Los Angeles 26, California,
Attorney for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Interest of Amicus Curiae	1
Argument	2
Conclusion	3

TABLE OF AUTHORITIES CITED

Cases

Todisco v. United States, No. 627, October Term 1961, cert. den. 368 U. S. 989	1, 2
American Dietaids Co., Inc. v. Celebrezze, No. 360	3
Clinton v. Virginia, No. 294	3
Gibson v. United States, No. 145	2
Lopez v. United States, 373 U. S. 427	2, 3
Palermo v. United States, No. 122	2
Sica v. United States, No. 134	2

Rules

Rules of the Superior Court, Rule 42(1)	1

Statute

United States Constitution, Fourth Amendment	1

IN THE

Supreme Court of the United States

October Term, 1963
No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

This brief is being filed with the consent of the parties pursuant to Rule 42(1) of this Court. The letters of consent are being sent to the Clerk of this Court concurrently with the forwarding of this brief.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is a voluntary membership organization dedicated to the preservation and effectuation of the rights guaranteed by the Bill of Rights of the United States Constitution. It has previously before this Court, in an amicus curiae brief in *Todisco v. United States,* No. 627, October Term 1961, cert. den. 368 U. S. 989, urged that electronic eavesdropping, such as disclosed in the record of the instant case, violates the Fourth Amendment.[1] Hence this brief.

[1]Amicus is aware that there are other points raised in the petition for writ of certiorari herein as well as by the petitions in the

Argument.

In its brief in *Todisco v. United States,* No. 627, October Term 1961, cert. den. 368 U. S. 989, amicus said (p. 2): "Certiorari should be granted in order to afford this Court an opportunity to reconsider On Lee v. United States, 343 U. S. 747, to overrule it and establish as the law the principles urged by the dissenting opinions in that case and in Olmstead v. United States, 277 U. S. 438, or, at least, to limit the application of On Lee."

Amicus is of the same view today and again urges the Court to grant certiorari for the same purpose.

Since respondent in the *Todisco* case was the United States and was represented there and here by the Solicitor General, and since the attorneys for *amicus curiae* in *Todisco* are attorneys for petitioner here, we do not repeat the argument set forth in the brief in *Todisco,* but incorporate the same herein as though fully set forth and respectfully invite the Court's and counsel's attention thereto.

A word should be added, however.

As noted, this Court denied certiorari in *Todisco,* but it granted certiorari in, and decided, *Lopez v. United States,* 373 U. S. 427. *Lopez,* like *Todisco,* involved a factual situation in which the defendant knew that he was talking to a government agent.

---

companion cases (*Palermo v. United States,* No. 122; *Sica v. United States,* No. 134; *Gibson v. United States,* No. 145). Amicus is taking no position on the other questions raised in the cases, but confines itself to the electronic eavesdropping matters discussed in Point III, pp. 16-22 of the Petition and in the Supplement to the Petition in the instant case, points 1 and 2 (pp. 1-9) in the Petition in No. 122, Point III (p. 19) in the Petition in No. 134, and Point I, F (p. 28) in the Petition in No. 145.

As we read both the majority and concurring opinions in *Lopez*, this was a significant factor. In the instant case Daly did not know that Leonard was a government agent. This case, thus, is quite different, factually, from *Lopez* and furnishes basis for hearing by this Court. The presence of electronic eavesdropping is of ever-recurring importance and presents itself in a variety of factual settings. *Cf. American Dietaids Co., Inc. v. Celebrezze*, pending before this Court, No. 360, this Term, and *Clinton v. Virginia*, No. 294, this term.

Conclusion.

The Petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. KENNY,
Attorney for Amicus Curiae.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 122.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION OF FRANK PALERMO FOR REHEARING.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 122.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION OF FRANK PALERMO FOR REHEARING.

Petitioner, Frank Palermo, prays that this Court grant a rehearing of its Order entered on June 1, 1964, denying the Petition for a Writ of Certiorari in this case, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, prayed for in the petition filed on May 10, 1963 (as of October Term, 1962, No. 1090), herein.

1. In the instant case, the record discloses that the district court denied an offer of proof that Negroes were excluded from the jury (R. T. 75-89). This was a ground relied on in the Petition for a Writ of Certiorari filed, at No. 145, by Truman Gibson (Gibson Petition, pp. 21-22), and adopted by Petitioner herein (Palermo Petition, p. 11).

On May 4, 1964, this Court determined, in *Coleman v. Alabama*, — U. S. —, 12 L. Ed. 2d 190, 84 S. Ct. —, that the defendant therein was entitled to prove his allegations as to exclusion of Negroes from jury service.

This Court has spoken with great force on the need to have the federal jury system comport with the democratic ideal. *Ballard v. United States*, 329 U. S. 187 (1947); *Thiel v. Southern Pacific Co.*, 328 U. S. 217 (1946). The opinion of the Court in *Ballard* declared that "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." 329 U. S., at 195. So strongly has this Court held to the vital necessity to preserve the integrity of the federal jury system that it has expressly held defects to be reversible error without any showing of other special prejudice or harm to the parties in a specific case. The fact, therefore, that petitioner is not a Negro is immaterial.

The court below, in this case, held that "There was no proof of exclusion" (Pet., App. A, p. 49a). But the offer in the district court was to show exclusion by race from jury service, and petitioner, who joined in the motion (R. T. 80), was denied the opportunity to adduce such evidence.[1] Accordingly, as in *Coleman v. Alabama, supra*, petitioner is "now entitled to have his day in court on his allegations." 12 L. Ed. 2d, at 1963.

Petitioner respectfully submits that the issue here presented is substantial, in the public interest, and is controlled by this Court's recently announced decision in *Coleman v. Alabama, supra.*

2. Further, substantial grounds for rehearing rest upon the recent decision of this Court in *Massiah v. United*

1. Here, unlike *Coleman v. Alabama*, the point at issue was preserved at all stages of the proceeding. The Court of Appeals in declaring that there was no proof of exclusion overlooked the district court's refusal to receive the proof offered.

States, — U. S. — (May 18, 1964). In that case it was held that the petitioner's rights under the Fifth and Sixth Amendments were violated by the use of statements elicited from the petitioner in the absence of his counsel.

(a) In the instant case, the record shows that petitioner, on May 6, 1959, had been arrested by a Los Angeles police officer at about 11:00 o'clock P. M. assertedly for pilfering from a newsstand. He was taken to a police station and not "booked" until 3:55 o'clock A. M. the next day or nearly 5:00 o'clock A. M., according to petitioner). He was released on bail on the afternoon of May 7. During this period he was questioned by a Los Angeles Police Officer concerning matters which became the subject of the instant indictment. Although petitioner requested counsel, he was not permitted to contact any during the interrogation. A motion to suppress, on which the above evidence was taken, was denied, and on cross-examination of the petitioner, the Government, over objection, was permitted to use a part of the illegal interrogation of the Los Angeles police for the purpose of contradicting the petitioner (R. T. 6212-6218).

(b) In addition petitioner adverts to the arrangements between the Los Angeles police and the witness Jackie Leonard for the intereception of telephone conversations between the petitioner and Leonard.

In both situations, in the light of *Massiah*, petitioner's rights under the Fifth and Sixth Amendments were infringed.

3. The use in evidence of recorded telephone conversations obtained with the consent of only one of the parties to the conversation continues to be a matter of large practical importance in the application of 47 U. S. C. § 605 and to the administration of justice. The view adopted by the

court below, identifying the situation presented with *Rathbun v. United States*, 355 U. S. 107, see also *Broadus v. United States*, 317 F. 2d 212, 213-214 (5th Cir. 1963), appears to be in conflict with the definition of "sender" adopted in *United States v. Tane*, 329 F. 2d 848 (2d Cir. 1964).

Although this Court had granted certiorari in *Ferguson v. United States*, 307 F. 2d 787 (certiorari granted June 10, 1963), review was not had because on the motion of the United States, remand was granted on January 6, 1964, — U. S. —, 11 L. Ed. 2d 413. It is submitted that the reasons which constrained this Court to grant certiorari in that case remain here.

WHEREFORE, your Petitioner prays that this Court grant rehearing of its Order denying the Petition for a Writ of Certiorari, and that the Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Certificate of Counsel.

I certify that this Petition is presented in good faith and not for delay and is restricted to substantial grounds available to petitioner not previously presented and to intervening circumstances of substantial or controlling effect.

JACOB KOSSMAN.

June, 1964.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUN 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 134

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

RUSSELL E. PARSONS,
306 West Third Street,
Los Angeles, Calif. 90013,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Reasons for granting rehearing and issuing the Writ	1
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases	Page
Benton v. United States, 233 F. 2d 491	6
Enlick v. Carrington, 19 Howells State Trials, 1029 (C. P. 1765)	5
Ker v. California, 374 U. S. 23	1, 2
Leyra v. Denno, 347 U. S. 556	2
Lopez v. United States, 373 U. S. 427	2, 5
Michaelson v. United States, 335 U. S. 469	6
Silverman v. United States, 365 U. S. 505	1, 2
Spang v. New York, 360 U. S. 315	2
United States v. Sweeney, 262 F. 2d 272	6
Rules	
Federal Rules of Criminal Procedure, Rule 25	8
Rules of the Supreme Court, Rule 58	1
Statutes	
United States Code, Title 18, Sec. 1951 (a), (b)	6
United States Constitution, Fourth Amendment	2
United States Constitution, Fifth Amendment	2

IN THE

Supreme Court of the United States

October Term, 1963
No. 134

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner Joseph Sica prays that this Court grant rehearing of its order of June 1, 1964, denying the Petition for Certiorari (this petition filed pursuant to Rule 58 of this Court), and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case, as prayed for in the Petition filed February 13, 1963.

Reasons for Granting Rehearing and Issuing the Writ.

1. That this Court on May 4, 1964,[1] reversed a conviction for crime which was obtained by the use of evidence of an eavesdropping nature which this Court

[1] *Clinton v. Virginia*, on Writ of Certiorari to the Supreme Court of Appeals of Virginia, No. 294, decided May 4, 1964, *per curiam*. The motion to strike the supplemental brief on behalf of the respondent is denied. The judgment is reversed. *Silverman v. United States*, 365 U. S. 505; *Ker v. California*, 374 U. S. 23. Mr. Justice Clark concurring. Since the court

held improper on the authority of *Silverman v. United States*, 365 U. S. 505; *Ker v. California*, 374 U. S. 23.

This Court in this session has again reaffirmed its zealous protection of individuals under the Fourth and Fifth Amendments, and as was said in the concurring opinion of Mr. Justice Warren, 373 U. S. 444, *Lopez v. United States*, 373 U. S. 427:

> "This court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie—in crime—to induce admissions from a suspect, but suffice it to say here the issue is substantial. We have already struck down the use of psychological pressures and appeals to friendship to induce admissions or confessions under not totally dissimilar circumstances."
>
> (Citing *Leyra v. Denno*, 347 U. S. 556; *Spano v. New York*, 360 U. S. 315.)

In this case, it must be remembered "the informer was the vehicle, whereby the accused's statements were transmitted to a third party whose subsequent testimony was evidence of the statement."

It should be borne in mind that Leonard, the witness, working with the police and acquainted with Daley made the statements to Daley concerning Sica. The police were standing by, had equipped Leonard with recording equipment, and he had approached Daley in his room at the hotel and apparently attempted to induce Daley to make certain statements by reason of suggested ques-

---

finds that the spike mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof, I join in the judgment. Mr. Justice White dissents.

tions, which Leonard put to Daley, questions suggested by the police, by whom he had been equipped with a recording device and the police were listening.

As was said:

"(a) Leonard: Joe Sica scared the S- out of Manuel yesterday. He called Manuel up and Manuel doesn't even know Joe Sica. He says, yeah, you're working for shithill, and he says he is not going to be around there long cause you a lot of trouble. When you are working with him scared S- out of him. You know I am used to these guys * * * calling me now (laughter) but Manuel doesn't know what the hell it is. I guess—Daley: How does he know Manuel? Does he know Manuel?

Leonard: No, he only saw him once in his life about ten years ago at some doings. He happened to be there or something and was introduced.

Daley: My God, is that what he did;

Leonard: Yeah.

Daley: That's a stupid thing.

Leonard: And then you know he wanted to meet Chargin, for what I don't know. He wanted to see Chargin the minute he gets into town, something I guess (***) (The asterisk indicates unintelligible word or phrase)

Daley: Oh, forget him.

Leonard: Get him (***)

Daley: Who did he say he wanted to see?

Leonard: He told Manuel he wanted to see—

Daley: He told who?

Leonard: He told Manuel he wanted to see Chargin right away.

Daley: (Laughter)" [C. T. 1358-59].

While talking from his hotel room, Daley ordered breakfast or lunch, which was recorded [C. T. 1363]. There were other extensive conversations relating to Gibson, Carbo [C. T. 1359, 1361-62]. A portion of the conversation relating to Sica is as follows:

"Daley: He don't know Mickey or anybody.

Leonard: No, uh-huh, no, the other day is the first time he ever met Joe Sica, and when Blinkey walked in first with Dragna he just walked out. Don did, and Blinkey didn't try to stop him or talk to him or anything. Then the next day when he came in with Sica, well, he said, 'I'm going to sit down and talk with you', so he sat down for about an hour, I guess, but Blinkey was screaming and hollering 'It's not the money, we want to know what you are going to do with the fighter. We want the money, but we want to know who he is going to fight and where he is going to fight or who he is going to fight.'" [C. T. 1376].

"Daley: So he must have??

Leonard: Old Joe Sica was at the gym yesterday.

Daley: Downtown?

Leonard: Uh-huh. Telling everybody, going around.

Daley: Was he?

Leonard: Yes. What he started to do is start a campaign around.

Daley: Yeah.

Leonard: But he told one guy he says, 'Jack is not getting away with this.' He says, 'Well, liable to get hurt over this thing.' I don't know why it is any of his business but make it somebody's

business in order to do Blinkey a favor, you know, in order to—

Daley: Well, then people in New York do them favors.

Leonard: Yeah. Then I guess Blinkey's connected with what—the longshore outfit." [C. T. 1387, 1388].

We respectfully quote a portion of the dissenting opinion of Mr. Justice Brennen in *Lopez, supra,* 373 U. S. 427, 450:

"The Fourth Amendment does not forbid all searches, but it defines the limits and conditions of permissible searches. The compelled disclosure of private communications by electronic means ought equally to be subject to legal regulation, and if this principle is granted I see no reasoned basis for reaching different results depending upon whether the conversation is with a private person, with a Federal undercover agent (On Lee) or with an avowed Federal agent as here."

Further quoting:

"It is in light of the Enlick decision[2] that a Government ought not to have the untrammeled right to extract evidence from people. Thus viewed the Fourth Amendment is complimentary to the Fifth (citing *Feldman v. United States,* 322 U. S. 487, 489, 490.) The informing principle of both amendments is nothing less than a comprehensive right of personal liberty in the face of governmental intrusion."

---

[2]See *Enlick v. Carrington,* 19 Howells State Trials, 1029 (C. P. 1765) cited in Mr. Justice Brennen's dissenting opinion in *Lopez v. United States, supra.*

2. The Court should grant a hearing in order to decide whether the prosecution made a charge in the indictment as to the bad reputation of the defendant and put in as part of its case in chief evidence of the reputation of the defendant without the defendants having ever put their reputations in issue.

We respectfully contend that the indictment alleging as we have just recited the bad reputation of the defendant, particularly Sica, and the permission given by the trial court to permit evidence by the witnesses that they had "known the reputation of Sica to have been an underworld reputation." As Leonard said, "by reputation I have always known of Joe Sica as an underworld man and a strong-arm man." [R. T. 722].

Nesseth testified over objection, "I knew Sica by reputation only as being an underworld figure" [R. T. 1865].

The opinion of the learned Circuit Court below is against decisions of other jurisdictions, namely, *Michaelson v. United States*, 335 U. S. 469, adopted with approval in *Benton v. United States*, 233 F. 2d 491 (4th Cir., 1956).

In *United States v. Sweeney*, 262 F. 2d 272, 3rd Circuit, decided 1959, discussing a conviction under 18 U. S. C. 1951, Subparagraph (a), Subparagraph (b), the Court said:

> "The trouble in this case is that the rebuttal testimony, while tending to prove that Sweeney lied also tended to show that he was a bad man full of violent deeds. It came at the very close of the case, it was not limited by the trial court's charge in any way assuming that such limitation

> would have saved it. Sweeney may well be an overbearing citizen with a short temper, but if he is to be convicted under the Hobbs Act, it must be for offenses under that Act, not because of his general propensity to commit assault and battery. With regret we think that the error in the admission of this testimony was so highly prejudicial that we must reverse the judgment and remand the case for a new trial."

We assert that this results in an unjustifiable discrimination between persons in different jurisdictions. This all important question should be resolved by this Court.

3. This testimony was aggravated by the Calla incident fully covered in our Petition concerning Leonard's testimony that Stanley came to his office and told him that Calla had been in the penitentiary in Cleveland for murder (in rebuttal) [R. T. 6260, 6261, 6360, photograph of Calla]. The evidence of the witness Chargin as to the anonymous phone call attributed to these defendants. The identity of the caller was never established, even remotely [R. T. 2237; 2239]. Added to the reputation evidence this successfully denied to Sica all vestige of that fair trial to which he was entitled under the Constitution and its Amendments. We have apparently not thoroughly brought this to the Court's attention, but respectfully urge that this alone should be grounds for a rehearing in the granting of certiorari in this case. The decision of the Ninth Circuit should not be allowed to stand.

(A) The petitioner Sica was denied a fair trial in that the successor judge who passed upon the motions after the untimely death of the trial judge without ever

having seen or heard the witnesses (Rule 25, Federal Rules of Criminal Procedure) was particularly applicable to Sica, for there was a sharp conflict between he and the witnesses because of the fact that he took the stand and testified. This all important point is one of first impression, we respectfully urge, and should be decided by this court.

Conclusion.

For the reasons set forth above, and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

We understand other counsel on behalf of other petitioners are filing petition for rehearing, and may we respectfully ask the Court to adopt the arguments and authorities cited in such petitions for rehearing in our behalf insofar as they may be applicable.

Respectfully submitted,

RUSSELL E. PARSONS,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 33 of the Rules of this Court.

RUSSELL E. PARSONS

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUN 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM B. BEIRNE,
408 South Spring Street,
Los Angeles 13, California,

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases

	Page
Arnold v. North Carolina, ... U. S. ...., 32 U. S. L. W. 4340	5
Clinton v. Virginia, ... U. S. ...., 32 U. S. L. W. 4387	2, 3
Coleman v. Alabama, ... U. S. ...., 32 U. S. L. W. 4384	4
Cullins v. Wainwright, 328 F. 2d 481	3
Ferguson v. United States, ... U. S. ...., 32 U. S. L. W. 3243	1, 2
Gibson v. United States, No. 145, Oct. Term, 1963	4, 5
Goldman v. United States, 316 U. S. 129	3
Lopez v. United States, 373 U. S. 427	2
Massiah v. United States, ... U. S. ...., 32 U. S. L. W. 4389	2
Palermo v. United States, No. 122, Oct. Term, 1963	5
Sica v. United States, No. 134, Oct. Term, 1963	5
Silverman v. United States, 365 U. S. 505	2, 3
United States v. Laughlin, 222 F. Supp. 264	4
United States v. Tane, 329 F. 2d 848	4

Rules

Rules of the Supreme Court, Rule 58(2)	1

Statutes

Federal Communications Act, Sec. 605	4
United States Code Annotated, Title 47, p. 605	4

IN THE

Supreme Court of the United States

October Term, 1963

No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This is a petition for rehearing of this Court's order of June 1, 1963 denying the petition for writ of certiorari and is filed pursuant to Rule 58(2) of the Rules of this Court.

Intervening circumstances of substantial effect have occurred subsequent to the filing of the Petition, the Supplement thereto and the Reply to the Brief for the United States in opposition.

The circumstances are these:

1. *Ferguson v. United States*, No. 198, Oct. Term, 1963 (No. 1170, Oct. Term, 1962), discussed in petitioner's Supplemental Petition (pp. 7-8) was remanded by this Court on January 6, 1964 on motion of the United States on a point not presented in the petition for writ of certiorari in that case, namely, whether the

right to cross-examination had been abridged. (..... U. S. ....., 32 U. S. L. W. 3243). Accordingly, the telephonic induction coil eavesdropping question which was present in the petition in that case and which is present here, has not been decided. The reasons which appealed to this Court in granting certiorari in *Ferguson* are, therefore, still cogent and should be ground for the grant of certiorari herein.

2. *Massiah v. United States*, discussed in the Supplement to petitioner's Petition for Writ of Certiorari herein (pp. 4-7), decided by this Court on May 18, 1964 (No. 199, Oct. Term, 1963, ... U. S. ....., 32 U. S. L. W. 4389), was decided on a point other than the question of surreptitious electronic eavesdropping by a governmental agent not known to be such by the defendant. Hence that question, present in that case, as in the instant one, and left open in *Lopez v. United States*, 373 U. S. 427 (discussed in the Supplement to Petition for Writ of Certiorari herein [pp. 8-15]) is still undecided. Hence the present case is an appropriate one for the grant of certiorari.

3. The continued, pervasive and unlawful, as we say, use of evidence obtained by electronic eavesdropping is an ever-present one, constantly being presented to this and other courts and one which calls for a definite pronouncement by this Court. For example, subsequent to the filing of the Petition and Supplement to Petition for Writ of certiorari:

a. This Court, on May 6, 1964, reversed *Clinton v. Virginia*, No. 294, Oct. Term, 1963, ... U. S. ..... 32 U. S. L. W. 4387. From the Court's citation of *Silverman v. United States*, 365 U. S. 505, and from

the concurring opinion of Mr. Justice Clark, it appears that the basis of the Court's decision was that there had been a "trespass" similar to that which had occurred in *Silverman*. However, as we understand the facts from a reading of the opinion of the Virginia Supreme Court (204 Va. 275, 130 S. E. 2d 437), the penetration into the wall was minute and could scarcely be said to have gone half way through the wall as apparently was the case in *Silverman* so as to justify a finding of "trespass." The description of the Virginia Supreme Court (130 S. E. 2d at 442) was that the device "was not driven into the wall, but was 'stuck in' it," and that "the penetration was very slight such as one made by a thumb tack to hold the small device in place." In truth, we respectfully suggest, *Clinton* casts grave doubt as to the present standing of *Goldman v. United States*, 316 U. S. 129, a doubt sufficient, we submit, to call for the grant of certiorari herein and a re-examination of the constitutionality of electronic eavesdropping.

b. The United States Court of Appeals for the Fifth Circuit, in *Cullins v. Wainwright*, 328 F. 2d 481, found it necessary on February 14, 1964 to reverse a District Court which, along with the Florida state courts, had held not violative of the right to freedom from unreasonable search, evidence obtained by the lowering of a microphone from one apartment down the air shaft so that the microphone was opposite the air shaft leading to the apartment below. Up to this point, the prosecution had successfully argued (p. 482) "that there has been no invasion or penetration of the apartment of Cross, and hence no rights were infringed."

c. In *United States v. Laughlin*, 222 F. Supp. 264, the United States District Court for the District of Columbia pointed out on October 8, 1963 (p. 265) "that neither the Supreme Court nor the Court of Appeals for this circuit has squarely passed upon the admissibility of such evidence." (a recording obtained by means of an induction coil attached to the telephone with the consent of one of the parties). And in the retrial of that case (223 F. Supp. 623), the court squarely held (p. 626) "that where a [telephone] conversation is recorded, regardless of the methods or the means used, without the consent of one of the parties, the right of privacy has been violated"—also, §605 of the Federal Communications Act (47 U. S. C. A. 605) has been violated.

This holding is, of course, directly in conflict with the case at bar.

d. And in *United States v. Tane*, 329 F. 2d 848; a divided Second Circuit Court of Appeals held that a "sender" within the meaning of §605 of the Federal Communications Act included the "receiver" of a telephone call on a phone not listed in the defendant's name and where the defendant was not on the wire the whole time of the conversation.

4. On May 4, 1964, this Court in *Coleman v. Alabama*, ... U. S. ....., 32 U. S. L. W. 4384, ruled that the refusal of the opportunity to make a showing of systematic exclusion of Negroes from the jury required reversal. Similar refusal of opportunity is present in the case at bar. See Petition for Writ of Certiorari in *Gibson v. United States*, No. 145, Oct. Term, 1963, pp. 21-22. By like token, therefore, certiorari should

be granted in the instant case. See also *Arnold v. North Carolina*, ... U. S. ....., 32 U. S. L. W. 4340, April 6, 1964.

5. Petitioner adopts, so far as applicable, the points made in the petitions for rehearing filed, or to be filed, in the companion cases of *Palermo v. United States*, No. 122, *Sica v. United States*, No. 134 and *Gibson v. United States*, No. 145, all, October Term, 1963.

Conclusion.

The Petition for rehearing and the petition for writ of certiorari should be granted.

Respectfully submitted.

WILLIAM B. BEIRNE,
A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

Certificate.

I certify that the within Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

FRED OKRAND

Dated: June 16, 1964.